No. 10419

United States

Circuit Court of Appeals

For the Ninth Circuit.

EDWARD F. ZAP,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 480

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Rotary Colorprint, 590 Folsom St., San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the Southern District of California, Central Division

Criminal No. 15728

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWARD F. ZAP and LLOYD SCOTT,

Defendants.

INDICTMENT

United States of America,
Southern District of California,
Central Division—ss.

Count I

The Grand Jurors of the United States of America, duly impaneled, sworn and charged in the District Court of the United States for the Southern District of California, Central Division, at the September 1942 Term of said Court, and inquiring for said District, do upon their oaths find and present as follows:

1. At all times herein mentioned the defendant Edward F. Zap was and is a resident of and was doing business within the Southern District of California, Central Division, under the firm name and style of E. F. Zap Aeronautical Engineers.

2. At all times herein mentioned the defendant Lloyd Scott was a Lieutenant Commander in the United States Navy and Assistant [2] Chief In-

spector of Naval Aircraft, Eleventh Naval District.

3. At all times herein mentioned the United States Navy was a duly constituted and lawful department and agency of the United States of America, and it was a lawful function and duty of the said Navy to design and test naval airplanes.

4. The United States of America on or about the 22nd day of March, 1941, and on or about the 15th day of May, 1942, in the City of Los Angeles, State of California, did make and enter into certain contracts with the said Edward F. Zap. Said contracts designated and knows as NXs 4105 and 83142 provided among other things that the said Edward F. Zap should engineer, design and build experimental aircraft and aircraft appliances for the United States Navy in consideration of the undertaking of the United States of America to compensate said Edward F. Zap by the payment of a fixed sum or sums for a certain portion or portions of the work to be done and by the payment of other portions on the basis of cost plus a fixed fee to said Edward F. Zap.

5. On or about the 23rd day of September, 1942, at Los Angeles, California, and at other places within the jurisdiction of this Court, to the Grand Jurors unknown, all within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and present and cause to be made and presented for payment and approval to an officer in the Naval Servige of the

United States of America a false claim upon and against the Government of the United States, well knowing the same to be false, fictitious and fraudulent, in the manner and by the means hereinafter set forth, to wit:

6. On or about the 23rd day of September, 1942, the defendants Edward F. Zap and Lloyd Scott did present to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the United States naval service, a claim which falsely purported to be for reimbursement [3] for expenses incurred pursuant to the aforementioned contract NXs 4105. Said expenses purported to be for the conducting of certain wind tunnel tests by the University of Washington, under the terms and provisions of said contracts.

7. Defendants Edward F. Zap and Lloyd Scott well know that said claim was false and well knew that said tests had not been performed by said University of Washington pursuant to contract NXs 4105 or any other contract with the United States Navy. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

Count II

8. And the Grand Jurors aforesaid upon their oaths do hereby further indict and present: All of the allegations contained in Paragraphs numbered 1, 2, 3, and 4 of Count I of this Indictment are

hereat realleged and incorporated by reference as if here set forth in full.

9. Prior to the presentment of this Indictment and within one year thereof at Los Angeles, California, and at other places within the jurisdiction of this Court, to the Grand Jurors unknown, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously falsify, conceal, and cover up by trick, scheme, and device a material fact and make and cause to be made a false and fraudulent statement and representation in a matter within the jurisdiction of a department and agency of the United States of America, namely, the United States Navy, in the following manner and by the following means, to wit:

10. Prior to the presentment of this Indictment and within one year thereof defendants Edward F. Zap and Lloyd Scott did falsely represent to Hilton Byers who was then and there a United States Naval Cost Inspector that a bill presented by the University of Washington for certain wind tunnel tests was incurred pursuant to the [4] aforesaid contract NXs 4105 with the United States Government.

11. That said representations were false in that said wind tunnel tests had not been performed by the University of Washington, or anyone else, pursuant to said contract NXs 4105, or any other contract to which the United States was a party. Said

defendants Edward F. Zap and Lloyd Scott well knew that said representations were false, and that said bill for expenses had not been incurred pursuant to said contract NXs 4105, or any other contract to which the United States was a party. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

Count III

12. And the Grand Jurors aforesaid upon their oaths do hereby further indict and present: All of the allegations contained in Paragraphs numbered 1, 2, 3, and 4 of Count I of this Indictment are hereat realleged and incorporated by reference as if here set forth in full.

13. Prior to the presentment of this Indictment and within one year thereof at Los Angeles, California, and at other places within the jurisdiction of this Court, to the Grand Jurors unknown, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and use and cause to be made and used a false bill, receipt, voucher, roll, account, claim, certificate, and affidavit knowing the same to contain fraudulent and fictitious statements and entries in a matter within the jurisdiction of a department or agency of the United States of America, namely, the United States Navy in the following manner and by the following means, to wit:

14. Prior to the presentment of this Indictment

and within one year thereof, defendants Edward F. Zap and Lloyd Scott did apportion and cause to be entered upon the books and records of said Edward F. [5] Zap false entries of and pertaining to sums of money paid to the University of Washington for conducting wind tunnel tests in such a manner as to falsely reflect and falsely represent that said moneys had been paid pursuant to the aforesaid contract NXs 4105 with the United States of America. That said entries upon said books and records were false in that said sums of money had not been paid to the University of Washington, or anyone else, for conducting said wind tunnel tests for the benefit of the United States under said contract No. NXs 4105, or any other contract to which the United States was a party. That said books and records of said Edward F. Zap were matters within the jurisdiction of the United States Navy, in that by the terms and conditions of said contracts between the United States Navy and said Edward F. Zap, said books were subject to scrutiny of and inspection by said United States Navy; that defendants well knew that said books and records of Edward F. Zap were to be inspected by the United States Navy for the purpose of determining the costs incurred by said Zap in performing said contracts.

15. Said defendants Edward F. Zap and Lloyd Scott then and there well knew that said book entries were false and that said moneys had not been expended pursuant to said contract NXs 4105; or

any other confract to which the United States was a party. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

Count IV

16. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if here set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3, and 4 of Count I of this Indictment and do further present and indict:

17. That on or about the 16th day of October, 1942, at Los Angeles, California, and at other places, to the Grand Jurors unknown, within the jurisdiction of this Court and within the Southern District [6] of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and present and cause to be made and presented for payment and approval to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the United States naval service, a false claim, knowing the same to be false, fictitious and fraudulent, in the following manner and by the following means, to wit:

18. On or about the 16th day of October, 1942, defendants Edward F. Zap and Lloyd Scott did make and present a claim for $4,000 upon the United States Navy for payment by presenting

same to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California. That said claim falsely purported to be for expenses incurred by said defendants in paying William H. McAvoy for services falsely therein set forth to have been rendered by said McAvoy as a test pilot of aeronautical equipment pursuant to the aforementioned contract 83142. That said claim was false in that the sum of money actually paid to said William H. McAvoy for said services was $2,375, and no more, and not $4,000, as therein set forth.

19. Defendants Edward F. Zap and Lloyd Scott, well know that in fact said William H. McAvoy had been paid by said defendants the sum of approximately $2,375, and no more, for the said services pursuant to contract 83142 and that no other and further expenses had been incurred by said defendants for the services of said William H. McAvoy. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

Count V

20. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if here set forth in full each and every allegation and statement contained in Paragraph 1, [7] 2, 3, and 4 of Count I of this Indictment and do further present and indict:

21. That on or about the 23rd day of September, 1942, at Los Angeles, California, and at other places, to the Grand Jurors unknown, within the jurisdic-

tion of this Court and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously falsify and conceal and cover up by trick, scheme, and device, a material fact and make and cause to be made a false and fraudulent statement and representation in a matter within the jurisdiction of a department or agency of the United States, namely, the United States Navy, in the following manner and by the following means, to wit:

22. On or about the 23rd day of September, 1942, defendants Edward F. Zap and Lloyd Scott did falsely state and represent to Hilton Byers, who was then and there the United States Navy Cost Inspector, that the sum of $4,000 had been paid to William H. McAvoy for acting as test pilot in conducting certain tests pursuant to said contract 83142 and did present to said Cost Inspector in support of said false statement and representation a cancelled check for $4,000 endorsed by said William H. McAvoy. That defendants had previously presented to said McAvoy a check in blank and requested said McAvoy to endorse the same. That said McAvoy did so endorse the same, and thereafter the defendants filled the same in in the figure of $4,000, and thereafter the defendants presented the same to the bank upon which it was drawn for payment, and received payment thereon, and thereafter presented to said Navy Cost Inspector said check, cancelled, in the sum of $4,000 and endorsed by said William H. McAvoy, as aforesaid.

23. Defendants Edward F. Zap and Lloyd Scott well knew that said McAvoy had been paid approximately $2,375, and no more, for conducting said test flights and that no other further sums had been [8] incurred for and on account of said test flight expenses, and defendants Edward F. Zap and Lloyd Scott well knew that said cancelled check for $4,000 had been endorsed by said William H. McAvoy while the said check was blank and before said figure of $4,000 had been placed thereon. All of which is contrary to the form of statute in such case made and provided and against the peace and dignity of the United States.

Count VI

24. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate as if herein set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3, and 4 of Count I of this Indictment and do further present and indict:

25. On or about the 23rd day of September, 1942, at Los Angeles, California, and at other places, to the Grand Jurors unknown, and within the jurisdiction of this Court and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and felonously make and use and caused to be made and used a false bill, receipt, voucher, roll, account, claim, certificate, and affidavit, knowing the same to contain fraudulent and fictitious statements and entries in a matter within the juris-

diction of a department and agency of the United States, namely; the United States Navy, in the following manner and by the following means, to wit:

26. On or about the 23rd day of September, 1942, defendants Edward F. Zap and Lloyd Scott did induce William H. McAvoy to endorse a blank check and did later fill in said check for the sum of $4,000.

27. And further said defendants Edward F. Zap and Lloyd Scott did present said check in the sum of $4,000 to the bank upon which it was drawn for payment and received payment thereof and did thereafter falsely enter the sum of $4,000 upon the books and records of Edward F. Zap as having been paid to said William H. McAvoy as payment [9] for his services as a test pilot pursuant to said contract 83142. That said defendants then and there well knew that said books and records of Edward F. Zap were matters within the jurisdiction of the United States Navy and were to be submitted to and inspected by said United States Navy in order to determine the cost to said Edward F. Zap of performing said contracts. Said defendants Edward F. Zap and Lloyd Scott then and there well knew that said entries were false and that said William H. McAvoy had been paid the sum of approximately $2,075, and no more, for his services and all thereof as test pilot pursuant to said contract 83142 and that no other and further sum had been incurred for and on account thereof. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

Count VII

28. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if herein set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3, and 4 of Count I of this Indictment and do further present and indict:

29. That on or about the 9th day of October, 1942, at Los Angeles, California, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and present and cause to be made and presented to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the naval service of the United States, a false claim upon and against the Government of the United States, well knowing the same to be false, fictitious, and fraudulent in the following manner and by the following means, to wit:

30. On or about the 9th day of October, 1942, defendants Edward F. Zap and Lloyd Scott did present a false claim to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San [10] Diego, California, who was then and there an officer of the United States Navy, for reimbursement for expenses falsely stated thereon to have been incurred pursuant to the aforementioned contract 83142, for a trip to Daggett, California, for the purpose of making test flights on a naval airplane.

31. Defendants Edward F. Zap and Lloyd Scott well knew that said falsely claimed expenses had not been incurred or expended by them under and pursuant to said contract 83142, or any other contract to which the United States was a party, and the defendants then and there well knew that in truth and in fact said expenses were fictitious and had not been incurred or expended by them under and pursuant to any contract to which the United States was a party, or otherwise or at all. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

Count VIII

32. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if herein set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3, and 4 of Count I of this Indictment and do further present and indict:

33. That prior to the presentment of this Indictment and within one year thereof at Los Angeles, California, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously falsify and conceal and cover up by trick, scheme, and device a material fact and make a false and fraudulent statement and representation in a matter within the jurisdiction of a department and agency of the United States,

namely, the United States Navy, in the following manner and by the following means, to wit:

34. Prior to the presentment of this Indictment and within one year thereof defendants Edward F. Zap and Lloyd Scott did falsely [11] represent to Hilton Byers, who was then the Navy Cost Inspector, that certain expenses had been incurred by said Edward F. Zap in connection with a trip to Daggett, California, pursuant to the said contract 83142 for the purpose of testing the design of an airplane and of the parts thereof.

35. Said defendants Edward F. Zap and Lloyd Scott then and there well knew that the said expenses had not been incurred by said Edward F. Zap under and pursuant to the terms and conditions of said contract 83142, or otherwise or at all. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

Count IX

36. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if herein set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3, and 4 of Count I of this Indictment and do further present and indict:

37. That prior to the presentment of this Indictment and within one year thereof at Los Angeles, California, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly,

wilfully, and feloniously make and use and cause to be made and used a false bill, receipt, voucher, roll, account, claim, certificate, and affidavit, knowing the same to contain fraudulent and fictitious statements and entries in a matter within the jurisdiction of a department and agency of the United States, namely, the United States Navy, in the following manner and by the following means, to wit:

38. Prior to the presentment of this Indictment and within one year thereof defendants Edward F. Zap and Lloyd Scott did cause to be entered upon the books and records of the said Edward F. Zap entries falsely purporting to reflect and show that there had been incurred on a trip to Daggett, California, for the purpose of testing the [12] design of a Navy airplane pursuant to the said contract 83142 expenses in the sum of $1260. That the defendants then and there well knew that said books of said Edward F. Zap were matters within the jurisdiction of the United States Navy and that said books of said Edward F. Zap were to be submitted to and inspected by said United States Navy to determine the cost to said Edward F. Zap of performing said contracts. That said defendants did falsely represent to the Naval Cost Inspector that said entries were true; and did falsely represent to said Naval Cost Inspector that such false entries reflected actual expenses by said defendants incurred and paid under the terms and provisions of said contract 83142.

39. Said defendants Edward F. Zap and Lloyd Scott well knew that such entries were false and such representations were false and that in fact said defendant Edward F. Zap had incurred expenses amounting to approximately $600, and no more. All of which is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Count X

40. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if herein set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3, and 4 of Count I of this Indictment and do further present and indict:

41. That on or about the 4th day of May, 1942, at Los Angeles, California, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and present and cause to be made and presented for approval and payment to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the United States naval service, a false claim, well knowing the same to be false, fictitious, and fraudulent in the following manner and by the following [13] means, to wit:

42. On or about the 4th day of May, 1942, defendants Edward F. Zap and Lloyd Scott did pre-

sent a false claim for reimbursement to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the United States naval service. That said claim was false in that it purported to be a claim for moneys paid to one L. E. Reed pursuant to said contract 83142 for the construction and fabrication of certain model airplane work commonly known as "mock-ups."

43. Said defendants Edward F. Zap and Lloyd Scott well knew that said "mock-ups" had not in fact been constructed pursuant to contract 83142 and that said "mock-ups" had not been constructed by the defendants pursuant to any other contract with the United States Navy, and defendants well knew that in truth and in fact said "mock-ups" had been used in certain private experiments of defendant Edward F. Zap. All of which is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Count XI

44. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate each and every allegation and statement contained in Paragraphs 1, 2, 3, and 4 of Count 1 of this Indictment and do further present and indict:

45. That prior to the presentment of this Indictment and within one year thereof defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously falsify and conceal

and cover up by trick, scheme, and device a material fact and make and cause to be made false and fraudulent statements and representations in a matter within the jurisdiction of a department and agency of the United States, namely, the United States Navy, in the following manner and by the following means, to wit:

46. On or about the 4th day of May, 1942, said defendants [14] Edward F. Zap and Lloyd Scott did falsely represent to Hilton Byers who was then the Navy Cost Inspector that a receipt for moneys paid by them in the sum of $1100 given to defendants by L. E. Reed was a receipt evidencing expenses incurred and paid by said defendants pursuant to said contract 83142. That defendants well knew that said receipt was a matter within the jurisdiction of the United States Navy, and that the same was to be inspected by the United States Navy in order to determine the cost to said Edward F. Zap of performing said contract.

47. Defendants Edward F. Zap and Lloyd Scott well knew that said representations were false in that not all the work paid for with the moneys for which said receipt was given by said Reed was done pursuant to and in performance of contract 83142 and that approximately $700 of said work was done upon certain private experiments of defendant Edward F. Zap and not pursuant to any contract to which the United States Government was a party. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

Count XII

48. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if herein set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3, and 4 of Count I of this Indictment and do further present and indict:

49. That prior to the presentment of this Indictment and within one year thereof at Los Angeles, California, within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and use and cause to be made and used a false bill, receipt, voucher, roll, account, claim, certificate, and affidavit, knowing the same to contain fraudulent and fictitious statements and entries in a matter within the jurisdiction of a department and agency of the [15] United States, namely, the United States Navy, in the following manner and by the following means, to wit:

50. Prior to the presentment of this Indictment and within one year thereof the defendants Edward F. Zap and Lloyd Scott did falsely enter and apportion upon the books of said defendant Edward F. Zap false entries purporting to reflect and show sums of money amounting to approximately $1100 to have been paid to L. E. Reed by said Edward F. Zap for the fabrication of certain "mock-ups" in such a way as to falsely reflect, show and represent upon said books that said "mock-ups" had been ordered and paid for pursuant to contract 83142. That

defendants well knew that said books and records of said Edward F. Zap were matters within the jurisdiction of the United States Navy and that said books and records of said Edward F. Zap would be submitted to and inspected by the United States Navy to determine the costs of said Edward F. Zap in performing said contracts.

51. Said defendants Edward F. Zap and Lloyd Scott then and there well knew that in truth and in fact said "mock-ups" had not been ordered and said services had not been performed pursuant to said contract 83142, or any other contract to which the United States was a party, and that $700 of the money so expended for and on account of said "mock-ups" had been expended pursuant to and on account of certain experiments being conducted by Edward F. Zap for and on his own account and not pursuant to any contract to which the United States Government was a party. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

Count XIII

52. And the Grand Jurors upon their oaths do hereby reallege and reincorporate by reference as if herein set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3, and 4 of Count I of this Indictment and do further present and indict that prior to the presentment of this Indictment and within three [16] years thereof at Los Angeles, California, in the Southern District of California, Central Division, and at other places

within the jurisdiction of this Court, to the Grand Jurors unknown, Edward F. Zap and Lloyd Scott, the defendants herein, well knowing all the premises of aforesaid, did wilfully, unlawfully, feloniously, and wrongfully conspire, combine, confederate, and agree together and with each other and with divers other persons, to the Grand Jurors unknown, to defraud the United States of America by making false and fictitious entries upon the books and records of the Edward F. Zap Aeronautical Engineers which were to be submitted to and inspected by the United States Navy to determine the costs of said Edward F. Zap in performing said contracts and by preparing false and fictitious receipts and vouchers to be presented to the Navy Cost Accountants and by making false distributions and apportionments and allocations of expenses incurred by said Zap Company and by charging expenses incurred for labor and materials to those accounts upon which the Navy had agreed to compensate the said Edward F. Zap upon the basis of cost-plus-a-fixed-fee and by making and preparing false claims and vouchers to be presented for payment to the United States Navy upon the basis of the aforesaid false and fictitious entries, in the manner and means hereinafter set forth.

53. That is to say: Said defendant Edward F. Zap in his position as owner and manager of the said company did instruct the office employees to enter and charge upon his books cost of the labor performed by his employees upon projects which

were for his own account and upon projects which were being performed by the Navy upon a fixed fee basis to projects which were being performed on such cost-plus-a-fixed-fee basis for the United States Navy, under contracts therewith. That said employees did so enter such false and fictitious charges upon the said books of said Edward F. Zap in accordance with such instructions.

54. And as a further part of said conspiracy defendant Edward [17] F. Zap did instruct the bookkeepers of his said company to charge expenses incurred pursuant to projects which were being performed on his account and projects being performed upon a fixed fee basis to projects being performed on a cost plus a fixed fee basis. That said bookkeepers did so enter such false and fictitious charges upon said books of said Edward F. Zap in accordance with said instructions.

55. It was a further part of said conspiracy that defendant Lloyd Scott in his position as Assistant Chief Inspector of Naval Aireraft and as a Lieutenant Commander would, and said Lloyd Scott did, certify to the correctness of the above set forth incorrect entry and charging of labor costs and the above set forth incorrect charging entry of expenses incurred, and it was a further part of said conspiracy that said defendant Edward F. Zap would, and said Edward F. Zap did, pay to said defendant Lloyd Scott sums of money at different times and from time to time. And it was a further part of said conspiracy that defendant Edward F.

Zap would, and said Edward F. Zap did, make claims to the United States Navy for payment upon the basis of the hereinabove described false entries in the books and records of said Edward F. Zap.

56. And it was a further part of said conspiracy that defendant Lloyd Scott would, and said Lloyd Scott did, certify to the correctness of the above-mentioned false claims against the United States Navy.

Overt Acts

57. In pursuance of said conspiracy and to effect the objects thereof, the defendants did prior to the presentment of this Indictment and within three years thereof in the Southern District of California, Central Division, perform the following overt acts:

58. On or about the 30th day of October, 1942, defendant Edward F. Zap did present to the United States Navy for payment a false claim or voucher in the amount of $25,440 for labor falsely stated therein to have been performed pursuant to Item No. 1 (one) of con- [18] tract NXs 4105.

59. And in further pursuance of said conspiracy and to effect the objects thereof, on or about the 9th day of October, 1942, defendant Lloyd Scott falsely certified that a bill presented by said Edward F. Zap for expenses therein stated to have been incurred by said Edward F. Zap upon said test trip to Daggett, California, in the sum of $1260 was true and correct and justly owing and had been incurred by said Edward F. Zap in performing said contract 83142.

60. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

A true bill.

Dated: November 25, 1942.

ROY D. BAILEY
Foreman

THURMAN ARNOLD
Assistant Attorney General

WENDELL BERGE
Assistant Attorney General

TOM C. CLARK
Chief, War Frauds Unit

JAMES E. HARRINGTON
Special Assistant to the Attorney General

GEORGE R. MAURY
Special Assistant to the Attorney General

WALTER S. BINNS
Special Assistant to the Attorney General

LEO V. SILVERSTEIN
United States Attorney for the
Southern District of California

[Endorsed]: Filed Nov. 25, 1942. [19]

MINUTE ORDER OF NOVEMBER 25, 1942

At a stated term, to wit: The September Term, A. D. 1942 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 25th day of November in the

year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

An Indictment having been presented to the Court in this cause by the Foreman of the Grand Jury and ordered filed, upon motion of James E. Harrington, Esq., Special Assistant to the Attorney General, appearing for the Government, it is ordered that the bond of the defendant Edward F. Zap be and it hereby is fixed in the sum of $25,000.00, and that the bond of the defendant Lloyd V. Scott be and it hereby is fixed in the sum of $10,000.00, and that Bench Warrants be issued for the apprehension of said defendants. [20]

MINUTE ORDER OF NOVEMBER 27, 1942

At a stated term, to wit: The September Term, A. D. 1942 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 27th day of November in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable Harry A. Hollzer, District Judge.

[Title of Cause.]

This cause coming on ex parte; James E. Harrington, Special Assistant to the Attorney General,

appearing in behalf of the Government; Geo. I. Devore, Esq., appearing specially in behalf of the defendant Edward F. Zap; it is ordered that this cause be placed on the calendar for November 28, 1942, at 9:30 A. M. for hearing application of defendant Zap for reduction of bail. [21]

MINUTE ORDER OF NOVEMBER 28, 1942

At a stated term, to wit: The September Term, A. D. 1942 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Saturday the 28th day of November in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable Harry A. Hollzer, District Judge.

[Title of Cause.]

This cause coming on before the Court for hearing on oral application of defendant, Edward F. Zap, who is present in Court in custody, for reduction of bail; George R. Maury, Esq., Special Assistant to the Attorney General, appearing in behalf of the Government; George I. Devore, Esq., appearing specially in behalf of the defendant for this motion; Attorney Devore argues in support of oral application of defendant Zap for reduction of bail; Attorney Maury makes a statement.

Edward Frank Zap, the defendant, is called, sworn, and testifies on examination by the Court.

It is ordered that this matter be continued to November 30, 1942, at 2 P. M. for further hearing.

[22]

MINUTE ORDER OF NOVEMBER 30, 1942

At a stated term, to wit: The September Term, A. D. 1942 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 30th day of November in the year of our Lord one thousand nine hundred and forty-two,

Present: The Honorable Harry A. Hollzer, District Judge:

[Title of Cause.]

This cause coming on for further hearing on application of defendant Edward F. Zap for reduction of bail; and for arraignment and plea; James E. Harrington, Esq. and George R. Maury, Esq., Special Assistants to the Attorney General, appearing in behalf of the Government; George I. Devore, Esq., appearing specially for the motion in behalf of the defendant; Samuel Goldstein, Court Reporter, being present and reporting the proceedings; the defendant Edward F. Zap being present in Court in custody, now states his true name to be as charged in the Indictment, and waives the reading of the Indictment; it is ordered that the matter

be continued to December 7, 1942, at 11 A. M. for plea.

The defendant, Edward F. Zap, is called, sworn, and testifies re application for reduction of bail, on examination by Attorneys Devore and Maury; it is ordered that bail be reduced to $7,500.00 as to defendant Zap. [23]

MINUTE ORDER OF DECEMBER 7, 1942

At a stated term, to wit: The September Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the 7th day of December in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable Harry A. Hollzer, District Judge.

[Title of Cause.]

This cause coming on for arraignment and plea of the defendants Edward F. Zap and Lloyd Scott; Walter Binns, Esq., Special Assistant to the Attorney General, appearing for the Government; Morris Lavine, Esq., appearing as counsel for the defendant Zap; Harry G. Balter, Esq., appearing as counsel for defendant Scott; James Marquardt, Court Reporter, being present and reporting the proceedings; defendant Zap being present in Court on bond now states his true name to be as charged

in the indictment; defendant Scott states his true name to be Lloyd V. Scott; both defendants waive the reading of the indictment; Attorney Lavine asks for a two weeks' continuance for plea and for hearing any demurrer or motion; it is ordered that this matter be continued to December 21, 1942, at 10 A. M. for plea and hearing on any motion or demurrer, and further ordered that any such motion or demurrer be filed by December 16, 1942. [24]

(Printer's Note): Demurrer to Indictment is not set forth in this printed transcript of record at this point, as it is in the Bill of Exceptions. The document is set forth at page 102 herein.

(Printer's Note): Minute Order of December 18, 1942, is not set forth in this printed transcript of record at this point, as it is in the Bill of Exceptions. The document is set forth at page 109 herein.

MINUTE ORDER OF DECEMBER 21, 1942

At a stated term, to wit: The September Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 21st day of December in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable Harry A. Hollzer, District Judge.

[Title of Cause.]

This cause coming on for hearing on demurrers of defendants Edward F. Zap and Lloyd V. Scott; hearing on motions of said defendants for a Bill of Particulars, and for plea of each of said defendants; George R. Maury, Esq., Special Assistant to the Attorney General, appearing for the Government; Morris Lavine, Esq., appearing as counsel for defendant Zap, who is present in Court on bond; Harry G. Balter, Esq., appearing as counsel for the defendant Scott, the defendant Scott being absent; it is ordered that this matter be and it hereby is continued to January 12, 1943, at 10 A. M. for hearing demurrers, motions, and for plea of each of the said defendants. [32]

MINUTE ORDER OF JANUARY 12, 1943

At a stated term, to-wit: The September Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 12th day of January in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Leon R. Yankwich, District Judge.

[Title of Cause.]

This cause coming on for hearing on motion of defendants for return of papers, files and documents pursuant to notice filed by defendant Zap December 29, 1942; hearing on demurrer of defendant Zap, and hearing on motion of defendant Zap for Bill of Particulars, and hearing on demurrer of defendant Scott, hearing on motion of defendant Scott for a Bill of Particulars, and for plea of said defendants; Walter S. Binns, Esq., and Harold F. Collins, Esq., appearing as counsel for the Government; Morris Lavine, Esq., appearing as counsel for defendant Zap; Harry G. Balter, Esq., appearing as counsel for defendant Scott; A. H. Bargion, Court Reporter, being present and reporting the proceedings; the defendant Lloyd V. Scott being present; defendant Edward F. Zap being absent.

Attorney Lavine files waiver of appearance of defendant Zap and doctor's certificate of illness of defendant Zap; Attorney Lavine makes a statement re motion for return of papers; Attorney Collins makes a statement. The Court holds it has no jurisdiction in the matter. Exception noted.

Attorney Lavine presents demurrer; demurrer is overruled and exception noted.

Attorney Lavine presents motion for Bill of Particulars for defendant Zap, which is denied by the Court and exception noted.

Attorney Balter presents demurrer of defendant Scott and his motion for Bill of Particulars. Attorney Collins makes statement in reply. The Court

overrules the demurrer and denies motion for Bill of Particulars and exception noted. [33]

Defendant Lloyd V. Scott waives the reading of the Indictment and enters plea of not guilty; it is ordered that this cause be, and it hereby is, continued to April 6, 1943, for plea of defendant Zap, pursuant to stipulation of counsel, and it is further ordered that this cause be, and it hereby is, set for trial for April 6, 1943, at 10 A. M. [34]

MINUTE ORDER OF MARCH 15, 1943

At a stated term, to-wit: The February Term A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 15th day of March in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable Leon R. Yankwich, District Judge.

[Title of Cause.]

This cause coming on for hearing on motion of defendant Zap to suppress evidence and for return of documents seized, and other matters on calendar; Geo. Maury, Esq. Special Attorney, appearing for the Government; Morris Lavine, Esq., appearing as counsel for defendant Zap; H. G. Balter, Esq., appearing for the defendant Scott; Samuel Goldstein, Court Reporter, being present and reporting the proceedings.

Attorney Lavine asks to present oral testimony in connection with hearing on motion of defendant Zap to suppress evidence and for return of documents seized, which is denied by the Court and an exception noted. It is ordered that said motion to suppress, etc. be, and it is submitted on affidavits to be filed 3 x 3.

Plea in abatement of defendant Zap is ordered submitted, together with demurrer to and motion of the Government to strike plea in abatement.

Motion of defendant Zap to inspect minutes of Grand Jury is denied and exception noted. [35].

(Printer's Note): Minute Order of March 24, 1943, is not set forth in this printed transcript of record at this point, as it is in the Bill of Exceptions. The document is set forth at page 203 herein.

MINUTE ORDER OF APRIL 6, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 6th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for Jury trial of the defendants Lloyd Scott and Edward F. Zap; George R. Maury, Walter S. Binns, and Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; Harry Graham Balter, Esq., appearing as counsel for the defendant Scott; Morris Lavine, Esq., appearing as counsel for the defendant Zap; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; the defendants being present in Court.

Attorney Lavine states that the defendant Zap is not ready for trial, and presents affidavit to the Court. Attorney Maury makes a statement.

Both defendants now enter pleas of not guilty to all counts of the Indictment.

Murray B. Myerson, Special Agent for the Department of Justice, is called, sworn, and examined by Attorney Maury on the question before the Court for a continuance, etc., and is cross-examined by Attorney Lavine.

Attorney Lavine objects to the jurisdiction of the Court to try this cause and argues in support thereof. Attorney Balter makes a statement on behalf of defendant Scott, and requests that the Government be required to elect on which theory it will proceed, etc. Attorney Maury argues in opposition thereto.

Motions of defendants are denied, and an exception allowed each defendant—all out of the hearing of the Jury.

At 11:14 A. M. counsel stipulate that a Jury may be impaneled for [38] the trial of this cause from the panel of jurors in the Courtroom, with the understanding that if this particular panel is exhausted, recourse may be had to the balance of panel in Judge Yankwich's Courtroom for additional jurors to complete the Jury for the trial of this cause. The Clerk draws the names of the following twelve jurors, who take their seats in the Jury box:

1. Elisha J. Benton
2. Edward S. Wiget
3. Harry J. Raymond
4. Fred James Wilson
5. J. K. Boyer
6. Walter F. Lange
7. Philip J. Wolman
8. D. C. Wright
9. J. Henry Harris
10. Albert F. Bolz
11. Raymond Zens
12. Lenox C. Ray

Attorney Maury reads names of Government witnesses to prospective jurors in the box.

The Court examines the prospective jurors for cause.

At 11:44 A. M. the Court admonishes the prospective jurors that during the progress of this trial and the recesses therein, they are not to speak to anyone or permit anyone to speak to them about this cause, or any matter or thing therewith connected; that until said cause is finally submitted to them for their deliberation under the instructions of the Court, they are not to speak to each other about this cause or any matter or thing therewith connected, or form or express any opinion concerning the merits of the trial until it is finally sub-

mitted to them, and declares a recess for ten minutes.

Court reconvenes at 11:52 A. M.; all present as before, and the prospective jurors are examined further for cause by the Court.

At 12 o'clock noon the Court reminds the jurors of the admonition heretofore given, and declares a recess to 1:30 P. M.; Court reconvenes at 1:30 P. M.; all present as before, except Attorney Binns; and, on motion of Attorney Marry, Miss Arbuthnot is associated as counsel for the Government in this case.

The prospective jurors in the box are examined for cause by Attorney Lavine and by Attorney Balter. Attorney Binns appears and examines the jurors for cause, and the jurors in the box are passed for cause.

Albert F. Bolz is excused by defendants on peremptory challenge; [39] it is ordered that one more name be drawn, and the name of Charles H. Hahn is drawn; examined for cause by the Court and by Attorneys Lavine, Balter and Binns, and passed for cause.

D. C. Wright is excused by defendants on peremptory challenge; it is ordered that one more name be drawn, and the name of Jens B. Jensen is drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause.

Lenox C. Day is excused by the Government on peremptory challenge; it is ordered that one more name be drawn, and the name of Edwin L. Kirk is

drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause.

J. Henry Harris is excused by defendants on peremptory challenge; it is ordered that one more name be drawn, and the name of James H. Knouse is drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause.

Walter F. Lange is excused by defendants on peremptory challenge; it is ordered that one more name be drawn, and the name of Harry F. Westrem is drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause.

Raymond Zens is excused by the Government on peremptory challenge; it is ordered that one more name be drawn, and the name of Glenn Helms is drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause.

Glenn Helms is excused by defendants on peremptory challenge; it is ordered that one more name be drawn, and the name of S. Allen Greer is drawn; examined for cause by the Court and by Attorneys Lavine and Balter, and passed for cause.

Harry J. Raymond is excused by the Government on peremptory challenge; it is ordered that one more name be drawn, and the name of George F. Howell is drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause.

S. Allen Greer is excused by defendants on peremptory challenge; it is ordered that one more name be drawn, and the name of Harry F. Burke is drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause. [40]

Harry F. Westrum is excused by defendants on peremptory challenge; it is ordered that one more name be drawn, and the name of Charles J. Foley is drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause.

Charles J. Foley is excused by defendants on peremptory challenge; it is ordered that one more name be drawn, and the name of Julius Wohl is drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause.

Harry F. Burke is excused by the Government on peremptory challenge; it is ordered that one more name be drawn, and the name of M. E. Barnhill is drawn; examined by the Court for cause and excused for cause; it is ordered that one more name be drawn, and the name of John T. Watson is drawn; examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause.

The Government waives its fifth peremptory challenge, and at 4:32 P. M. the Court reminds the jurors of the admonition heretofore given, and declares a recess.

Court reconvenes at 4:48 P. M.; all present

as before, and it is ordered that counsel proceed.

Charles H. Hahn is excused by defendants on peremptory challenge; it is ordered that one more name be drawn, and the name of Edward B. Lovie is drawn; examined for cause by the Court, and by Attorneys Lavine and Balter, and passed for cause.

There being no further challenges, the jurors now in the box are accepted and sworn as the Jury for the trial of this cause, viz.:

1. Elisha J. Benton
2. Edward S. Wiget
3. Geo. F. Howell
4. Fred James Wilson
5. T. K. Boyer
6. Julius Wohl
7. Philip J. Wolman
8. Jens B. Jensen
9. James H. Knouse
10. Edward B. Lovie
11. John T. Watson
12. Edwin L. Kirk

At 5:05 P. M. it is ordered that two alternate jurors be drawn, and the names of John P. McCarty and Chandos E. Marks are drawn; both examined for cause by the Court, and by Attorneys Lavine, Balter and Binns, and passed for cause, and there being no challenges, the said two alternate jurors are sworn. [41]

The Court reminds the 14 jurors of the admonition heretofore given, and declares a recess herein until 10 A. M. April 7, 1943. The balance of the panel, including the jurors from Judge Yankwich's Courtroom (none of whom were needed) are excused until notified. [42]

MINUTE ORDER OF APRIL 7, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 7th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further Jury trial: George R. Maury, Walter S. Binns, and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government: Harry Graham Balter, Esq., appearing as counsel for the defendant Lloyd Scott; Morris Lavine, Esq., appearing as counsel for the defendant Edward F. Zap; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; defendants and Jury are present, and it is so stipulated, and two alternate Jurymen being present.

Attorney Maury asks that juror Edward S. Wiget be excused and an alternate take his place, which request is resisted by counsel for defendants.

Murray B. Meyerson, heretofore sworn, makes a statement relative to juror Wiget being excused, and is cross-examined by Attorney Lavine.

James C. Stone is sworn and makes a statement

re juror Erward S. Wiget being excused, and is examined by Attorney Balter.

Juror Edward S. Wiget is excused from further jury service in this case, and the Clerk draws the name of alternate juror Chandos E. Marks, who takes seat No. 2 as a regular juror.

The Court reads the Indictment to the Jury.

At 11:24 A. M. the Court reminds the Jury of the admonition heretofore given, and declares a recess for ten minutes. Court reconvenes at 11:36 A. M.; all present as before, including defendants and Jury.

Attorney Lavine renews motion made before the trial commenced that the defendant Zap is denied due process of law guaranteed by the Fifth Amendment of the Constitution of the United States, upon all the grounds [43] therein set forth. The motion is denied and exception noted. Thereupon, Attorney Lavine requests a closed session of Court, in which request Attorney Balter joins. The Government resists the motion on the ground that the confidentialness of the records is no longer of any importance. Motion for closed session of Court is denied and an exception noted. Attorney Lavine moves for the exclusion of witnesses. Thereupon, all witnesses except defendants are ordered to leave the Courtroom, with the exception of Government Agent Murray F. Myerson and the wife of the defendant Zap, who are permitted to remain, and Lieutenant L. S. Minor may return to the Courtroom after he has testified.

At 11:44 A. M. Attorney Binns makes opening

statement to the Jury on behalf of the Government.

At 12:03 P. M. the Court reminds the Jury of the admonition heretofore given, and recesses herein to 1:30 P. M.

Court reconvenes at 1:30 P. M.; all present as before, including defendants and the Jury, and counsel so stipulate.

Attorney Lavine makes opening statement on behalf of defendant Zap to the Jury.

At 2:30 P. M. Attorney Balter makes opening statement to the Jury on behalf of defendant Scott.

Commander Glenn Albert Smith is called, sworn, and testifies for the Government.

At 4:16 P. M. the Court reminds the Jury of the admonition heretofore given, and declares a recess for ten minutes. Court reconvenes at 4:27 P. M.; all present as before, including defendants and the Jury, and counsel so stipulate.

Lieutenant Lucien Smith Minor is called, sworn, and testifies for the Government.

At 5:30 P. M. the Court reminds the Jury of the admonition heretofore given, and recesses in this cause to 1:00 P. M., April 8, 1943, and Court adjourns. [44]

MINUTE ORDER OF APRIL 8, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 8th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further Jury trial at 1:05 P. M.; George R. Maury, Walter S. Binns, and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government: Harry Graham Balter, Esq., appearing as counsel for the defendant Scott; Morris Lavine, Esq., appearing as counsel for defendant Zap; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; the defendants are present, and all jurors are present except juror Chandos E. Marks, who is absent. Juror Marks appears at 1:07 P. M. and counsel stipulate that defendants and jury are present; it is ordered that trial proceed.

Wm. Henry McAvoy is called, sworn, and testifies for the Government.

Fred S. Eastman is called, sworn, and testifies for the Government.

James W. Dwinnell is called, sworn, and testifies for the Government.

At 3:40 P. M. the Court reminds the Jury of the admonition heretofore given, and declares a ten minute recess; Court reconvenes at 3:50 P. M.; all present as before; defendants and Jury are present, and counsel so stipulate.

James W. Dwinnell resumes the stand and testifies further.

Raymond C. Davis is called, sworn, and testifies for the Government.

Lieutenant Lucien Smith Minor, heretofore sworn, resumes the stand and testifies further on examination by Attorney Maury.

At 6:02 P. M. the Court reminds the Jury of the admonition heretofore given, and recesses herein until 1 P. M. April 9, 1943, and Court adjourns. [45]

MINUTE ORDER OF APRIL 9, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 9th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further Jury trial at 1:03 P. M.; George R. Maury, Walter S. Binns, and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; Harry Graham Balter, Esq., appearing as counsel for the defendant Lloyd Scott; Morris Lavine, Esq., appearing as counsel for the defendant Edward F. Zap; the said defendants being present

in Court, and 13 jurors being present, counsel so stipulating; it is ordered that trial proceed.

Lieutenant Lucien Smith Minor, heretofore sworn, resumes the stand and testifies further.

At 3:30 P. M. the Court reminds the Jury of the admonition heretofore given, and declares a ten minutes recess; Court reconvenes at 3:56 P. M.; all present as before; defendants and jurors being present, and so stipulated by counsel; it is ordered that trial proceed.

Witness Minor resumes the stand and testifies further.

Stuart Eldredge Weaver, Jr. is called, sworn, and testifies for the Government.

Henry C. Webb is called, sworn, and testifies for the Government.

At 5:45 P. M. the Court reminds the Jury of the admonition heretofore given, and recesses herein until Monday, April 12, 1943, and Court adjourns.

[46]

MINUTE ORDER OF APRIL 12, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 12th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further Jury trial of the defendants Lloyd Scott and Edward F. Zap; George R. Maury, Walter S. Binns, and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; Harry Graham Balter, Esq., appearing as counsel for the defendant Scott; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; defendants being present in Court.

Court convenes herein at 10:20 A. M.; all present as indicated, and 13 jurors being present; Morris Lavine, Esq., attorney for defendant Zap, is absent (being in Judge Holtzer's Court); at 10:44 A. M. Attorney Lavine appears, and all being present as before; defendants and Jurors being present, and it is so stipulated; the Court orders that trial proceed.

Lieutenant Lucien Smith Minor, heretofore sworn, resumes the stand and testifies further on cross-examination by Attorney Lavine and by Attorney Balter, and redirect examination by Attorney Binns.

Thomas C. Browne is called, sworn, and testifies for the Government.

At 12:05 P. M. the Court reminds the jurors of the admonition heretofore given, and recesses to 2 P. M.

Court reconvenes at 2 P. M.; all present as before; defendants and jurors present, and counsel so stipulate; it is ordered that trial proceed.

Thomas C. Browne resumes the stand and testifies further.

At 5:15 P. M. the Court reminds the jurors of the admonition heretofore given, and declares a recess; Court reconvenes at 5:23 P. M., all [47] present as before; defendants and jurors are present, and it is ordered that trial proceed.

Earl W. Hanley is called, sworn, and testifies for the Government.

Mrs. Leona Hanley is called, sworn, and testifies for the Government.

At 5:55 P. M. the Court reminds the jurors of the admonition heretofore given, and recesses herein until 9 A. M. April 13, 1943, and Court adjourns.

[48]

MINUTE ORDER OF APRIL 13, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 13th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further Jury trial of defendants Lloyd Scott and Edward F. Zap; George R. Maury, Walter S. Binns, and Miss Sadie B.

Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; Harry Graham Balter, Esq., appearing as counsel for the defendant Scott; Morris Lavine, Esq., appearing as counsel for the defendant Zap; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; defendants and Jury are present, and it is so stipulated by counsel; it is ordered that trial proceed.

Harold Edward Dale is called, sworn, and testifies for the Government.

Miss Ethel H. Boyle is called, sworn, and testifies for the Government.

At 11:03 A. M. the Court reminds the jurors of the admonition heretofore given, and declares a recess; Court reconvenes herein at 11:26 A. M.; all present as before; defendants and jurors are present, and counsel so stipulate; it is ordered that trial proceed.

Frank Gorman Jeffers is called, sworn, and testifies for the Government.

Marion Simon Israel is called, sworn, and testifies for the Government.

Harold W. Curn is called, sworn, and testifies for the Government.

At 12:02 P. M. the Court reminds the jurors of the admonition heretofore given, and recesses herein to 2 P. M.

Court reconvenes at 2 P. M; all present as before; defendants [49] and jurors are present, and counsel so stipulate; it is ordered that trial proceed.

Harold W. Curn resumes the stand and testifies further.

Harold Simon Israel is recalled and testifies further.

Vernon Owen Orr is called, sworn, and testifies for the Government.

Gordon Albert Hast is called, sworn, and testifies for the Government.

Leland E. Reed is called, sworn, and testifies for the Government.

Harry Champlin is called, sworn, and testifies for the Government.

At 4:52 P. M. the Court reminds the jurors of the admonition heretofore given, and declares a recess.

Court reconvenes at 5:12 P. M.; all present as before; defendants and jurors are present, and counsel so stipulate; it is ordered that trial proceed.

Harry Champlin, resumes the stand and testifies further.

At 5:55 P. M. the Court reminds the jurors of the admonition heretofore given, and recesses herein to 9 A. M. April 14, 1943, and Court adjourns. [50]

MINUTE ORDER OF APRIL 14, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles

on Wednesday the 14th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further Jury trial; George R. Maury, Walter S. Binns, and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; Harry Graham Balter and Morris Lavine, Esqs., appearing as counsel for the defendants Scott and Zap, respectively; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; defendants and 13 jurors being present; it is ordered that trial proceed.

Harry Champlin, heretofore sworn, resumes the stand and testifies further.

At 11 A. M. the Court reminds the jurors of the admonition heretofore given, and declares a recess; Court reconvenes at 11:20 A. M.; all present as before; defendants and jurors are present, and counsel so stipulate; it is ordered that trial proceed.

Harry Champlin resumes the stand and testifies further.

Hilton Jack Byars is called, sworn, and testifies for the Government.

At 12 o'clock noon the Court reminds the jurors of the admonition heretofore given, and recesses to 1 P. M.

Court reconvenes at 1 P. M.; all present as before; defendants and jurors are present, and counsel so stipulate; it is ordered that trial proceed.

Witness Hilton Jack Byars resumes the stand and testifies further.

At 4:30 P. M. the Court reminds the jurors of the admonition heretofore given, and declares a recess.

Court reconvenes at 4:46 P. M.; all present as before; defendants and jurors are present, and counsel so stipulate; it is ordered that [51] trial proceed.

Witness Hilton Jack Byars resumes the stand and testifies further.

At 6:15 P. M. the Court reminds the jurors of the admonition heretofore given, and recesses herein until 9 A. M. April 15, 1943, and the Court instructs the jurors to appear at 9:30 A. M. [52]

MINUTE ORDER OF APRIL 15, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 15th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further Jury trial of the defendants Lloyd Scott and Edward F. Zap; George R. Maury, Walter S. Binns, and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; Harry Graham Balter, Esq., appearing as counsel for the defendant Scott; Morris Lavine, Esq., appearing as counsel for the defendant Zap; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; the defendants being present and the Jury being absent; it is ordered that counsel proceed.

Attorney Maury withdraws his motion to introduce Government's Exhibit No. 56 into evidence.

Defendant Zap, through Attorney Lavine, objects to the introduction of certain evidence, Government's Exhibit No. 55 for Identification, into evidence. Attorney Balter objects to the introduction into evidence of Government's Exhibit No. 55 for Identification. Attorney Maury argues in opposition thereto.

Attorney Balter moves for a directed verdict for defendant Scott on each and every count of the Indictment.

Government's Exhibit No. 33, in evidence, is withdrawn.

Attorney Maury moves to dismiss counts 1 to 6, inclusive, as to the defendant Scott, and it is so ordered.

The Government rests at 10:13 A.M.

Attorney Balter moves for directed verdict for

defendant Scott on counts 7 to 13, inclusive, and argues in support thereof.

Attorney Binns argues in opposition thereto. [53]

Attorney Balter argues further.

Attorney Lavine moves to compel the Government to elect upon which counts they will stand upon, and argues in support thereof.

Attorney Maury moves to dismiss counts 2 and 6 as to the defendant Zap alone, and counts 9 and 12 as to both defendants, and said motion is granted.

Attorney Lavine, in behalf of defendant Zap, moves that as to counts 1 and 3, 4 and 5, 7 and 8, and 10 and 11, the Government be compelled to elect on which it will go to trial against defendant Zap.

Attorney Maury argues in opposition. The motion is denied, and an exception noted for the defendant Zap.

Attorney Lavine moves to strike from the evidence portion of Government's Exhibit No. 30.

Attorney Maury argues in opposition thereto.

The motion is denied.

Defendant Zap, through Attorney Lavine, moves for directed verdict on each of the remaining counts left in the indictment, and argues in support thereof.

Attorney Binns argues in opposition.

The Court orders that conspiracy count 13 be, and it hereby is, dismissed as to both defendant.

The Court grants the motion of Attorney Balter for a directed verdict for defendant Scott on all remaining counts. The motion of Attorney Lavine for a directed verdict for the defendant Zap on the remaining counts is denied, and exception noted for the defendant Zap.

The case is now open against the defendant Zap only on counts 1, 3, 4, 5, 7, 8, 10 and 11.

At 11:15 A. M. Court recesses.

Attorney Balter and defendant Scott are discharged from the case.

Court reconvenes at 11:30 A. M.; Government counsel as before noted. Attorney Lavine, defendant Zap, and the jurors being present; it is ordered that trial proceed.

Miss Ethel H. Boyle is called, sworn, and testifies for the defendant Zap. [54]

Wallace Howe McLauchlan is called, sworn, and testifies for the defendant Zap.

At 12:05 P. M. the Court reminds the jurors of the admonition heretofore given, and recesses to 2 P. M.

Court reconvenes at 2 P. M.; all present as before; defendant Zap and jurors being present; it is ordered that trial proceed as to defendant Zap.

Witness Wallace Howe McLauchlan, heretofore sworn, resumes the stand and testifies further.

George Jue is called, sworn, and testifies for defendant Zap.

David Kehsin Wang is called, sworn, and testifies for defendant Zap.

Dale Alden Lichty is called, sworn, and testifies for defendant Zap.

Miss Ethel H. Boyle is recalled and testifies further for defendant Zap.

Mrs. Estelle Zap (wife of defendant) is called, sworn, and testifies for defendant Zap.

Edward F. Zap, defendant, is called, sworn, and testifies in his own behalf.

At 4 P. M. the Court reminds the jurors of the admonition heretofore given, and declares a recess; Court reconvenes at 4:17 P.M.; all present as before; defendant Zap and jurors are present, and counsel so stipulate; it is ordered that trial proceed.

Defendant Zap resumes the stand and testifies further.

It is ordered that the bond of the defendant Lloyd Scott be, and it hereby is exonerated.

At 5:35 P. M. the Court reminds the jurors of the admonition heretofore given, and recesses herein until 10 A. M. April 16, 1943, and court adjourns. [55]

MINUTE ORDER OF APRIL 16, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 16th day of April in the year of our Lard one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further Jury trial of the defendant Edward F. Zap on counts 1, 3, 4, 5, 7, 8, 10 and 11 only; George R. Maury, Esq., Walter S. Binns, Esq., and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; Morris Lavine, Esq., ap-

pearing as counsel for the defendant Zap; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; defendant Zap and jurors being present and counsel so stipulate; it is ordered that trial proceed.

William L. Butler is called, sworn, and testifies for the defendant Zap.

Harry S. Magill is called, sworn, and testifies for the defendant Zap.

Edward F. Zap, heretofore sworn, resumes the stand and testifies further in his own behalf.

At 12 o'clock noon the Court reminds the jurors of the admonition heretofore given, and recesses to 1:30 P. M.; Court reconvenes at 1:30 P. M.; all present as before; defendant Zap and jurors are present; it is ordered that trial proceed.

Witness Wm. L. Butler resumes the stand and testifies further.

At 1:40 P. M. defendant Zap resumes the stand and testifies further.

At 4:30 P. M. the Court reminds the jurors of the admonition heretofore given and declares a recess; Court reconvenes at 4:48 P. M.; all present as before; defendant Zap and jurors are present, and it is ordered that trial proceed.

Defendant Zap resumes the stand and testifies on cross-examination [56] by Attorney Maury, and on redirect examination by Attorney Lavine.

The defendant Zap rests at 6:20 P. M.

Hilton Jack Byars, heretofore sworn, resumes the stand and testifies for the Government is rebuttal.

Murray B. Myerson, special agent, F.B.I., hereto-

fore sworn, is called in rebuttal and testifies on direct examination by Attorney Binns and on cross-examination by Attorney Lavine.

U. S. Exhibits Nos. 34 to 45 are admitted into evidence.

At 6:45 P. M. the Court reminds the jurors of the admonition heretofore given, and excuses the jurors to 9 A. M. April 19, 1943, and Court recesses in this cause until that time. [57]

MINUTE ORDER OF APRIL 19, 1943

At a stated term, to wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 19th day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further Jury trial as to the defendant Edward F. Zap only, on counts 1, 3, 4, 5, 7, 8, 10 and 11; George R. Maury, Walter S. Binns, and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; Morris Lavine, Esq., appearing as counsel for the defendant Zap; John Q. Bybee and James R. Marquardt, Court Reporters, being present and reporting the proceedings; defendant Edward

F. Zap and 13 jurors being present, and counsel so stipulate; it is ordered that trial proceed.

Attorney Maury at 9:13 A. M. argues to the Jury on behalf of the Government.

Attorney Lavine at 9:58 A. M. argues to the Jury on behalf of defendant Zap.

At 11:25 A. M. the Court reminds the jurors of the admonition heretofore given, and declares a recess; Court reconvenes at 11:42 A. M.; all present as before; defendant Zap and jurors are present, and counsel so stipulate; it is ordered that counsel proceed.

Attorney Binns argues to the Jury in closing for the Government.

At 12:20 P. M. the Court reminds the jurors of the admonition heretofore given and recesses herein until 2:15 P. M.

Court reconvenes at 2:18 P. M.; all present as before; defendant Zap and jurors are present, and counsel so stipulate; it is ordered that trial proceed.

Juror McCarty is excused, and the Court instructs the Jury on the law of the case.

Attorney Lavine notes exceptions to certain instructions.

At 3:22 P. M. Bailiff Albert Kottner is sworn as the officer to [58] care for the Jury and the Jury retires for deliberation upon its verdict.

Court reconvenes at 4:35 P. M.; all present as before except the Jury and Attorney Binns, and it appearing that the Jury desires a copy of the Indictment and the instructions of the Court to the Jury sent up to them, and Attorney Binns later appearing, the Jury returns into Court at 4:50

P. M.; counsel stipulate that the Jury is present; the Court states it does not feel it proper to submit the Indictment to the Jury in view of the fact that some counts have been dismissed, and with regard to the instructions to the Jury the Court states it would take the reporter two hours or more to transcribe the instructions and would be willing to re-read any points of the instructions requested; and thereupon the Court reads from indictment and re-reads Jury instructions.

At 5:21 P. M. the Jury retires for further deliberation.

At 6 P. M. the Jury is ordered to dinner, with instructions to return at 7:30 P. M. The Jury goes to dinner at 6:30 P. M. at the Hayward Hotel and returns at 8:20 P. M. and retires for further deliberation.

At 11:12 P. M. Court reconvenes; all present as before; defendant Zap and Jury are present, and counsel so stipulate; Court Reporter Marquardt being present.

The Jury presents two verdicts, which are ordered read and filed, said verdicts being as follows:

[Title of District Court and Cause.]

VERDICT OF THE JURY

We, the jury in the above entitled case, find the defendant, Edward F. Zap, guilty as charged in the 1st count of the Indictment;

Not guilty as charged in the 3rd count of the Indictment;

Guilty as charged in the 4th count of the Indictment;

Guilty as charged in the 5th count of the Indictment; [59]

Not Guilty as charged in the 7th count of the Indictment;

Not Guilty as charged in the 8th count of the Indictment;

Not Guilty as charged in the 10th count of the Indictment;

Not Guilty as charged in the 11th count of the Indictment;

Dated: Los Angeles, California, April 19th, 1943.

EDWIN L. KIRK
Foreman of the Jury

Filed Apr. 19, 1943.
Edmund L. Smith, Clerk,
By Francis E. Cross, Deputy Clerk.

[Title of District Court and Cause.]

DIRECTED VERDICT OF THE JURY AS TO SCOTT

We, the jury in the above entitled case, find the defendant Lloyd Scott not guilty on each of the thirteen counts of the Indictment.

Dated: Los Angeles, Calif., April 19th, 1943.

EDWIN L. KIRK
Foreman of the Jury

Filed Apr. 19, 1943.
Edmund L. Smith, Clerk,
By Francis E. Cross, Deputy Clerk.

At 11:16 P. M. the jurors are excused until notified.

Attorney Lavine states he will make motion for new trial and other motions, and it is ordered that this cause be, and it hereby is, continued to Friday, April 23, 1943, at 10 A. M. for sentence, and defendant is ordered released on present bond meanwhile. [60]

[Title of District Court and Cause.]

VERDICT OF THE JURY

We, the jury in the above entitled case, find the defendant, Edward F. Zap:

Guilty as charged in the 1st count of the Indictment;

Not Guilty as charged in the 3rd count of the Indictment;

Guilty as charged in the 4th count of the Indictment;

Guilty as charged in the 5th count of the Indictment;

Not Guilty as charged in the 7th count of the Indictment;

Not Guilty as charged in the 8th count of the Indictment;

Not Guilty as charged in the 10th count of the Indictment; and

Not Guilty as charged in the 11th count of the Indictment.

Dated: Los Angeles, California, April 19th, 1943.

EDWIN L. KIRK
Foreman of the Jury

[Endorsed]: Filed Apr. 19, 1943. [61]

MINUTE ORDER OF APRIL 22, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 22nd day of April in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming before the Court at the hour of 10:15 o'clock A. M. for sentence of defendant, Edward F. Zap, on the first, fourth, and fifth counts of the Indictment; George R. Maury, Esq., Walter S. Binns, Esq., and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing as counsel for the Government; the defendant, Edward F. Zap, being present in Court on bond with his attorney, Morris Lavine, Esq., and James R. Marquardt, Court Reporter, being present and reporting the proceedings; and the Court having previously advanced the date for sentence of said de-

fendant from Friday, April 23, 1943, to Thursday, April 22, 1943; Attorney Morris Lavine, Esq., now moves for a new trial and in arrest of judgment, and argues in support thereof and files affidavit of Edward F. Zap; and Attorney George R. Maury, Esq., having argued in opposition to said motions, and Attorney Morris Lavine, Esq., having argued further in reply, it is now by the Court ordered that the said Motions for a new trial and in arrest of judgment be, and the same hereby are, denied, and that an exception be allowed to the defendant, Edward F. Zap; and the defendant Edward F. Zap having thereupon been asked if he has anything to show why judgment should not now be pronounced against him, and Morris Lavine, Esq., having made a statement relative to sentence, the defendant Edward F. Zap having made a statement in mitigation of sentence, and George R. Maury having made a statement, it is now the judgment of the Court that the defendant, Edward F. Zap, on count one of the Indictment, be fined the sum of $2,000.00 and be imprisoned in a county jail to be designated by the Attorney General for nine months; [62] on count four that said defendant be fined the sum of $2,000.00, and be imprisoned in a county jail to be designated by the Attorney General for nine months; and on count five that said defendant be fined the sum of $2,000.00 and be imprisoned in a county jail to be designated by the Attorney General for nine months, the county jail sentence to begin and to run concurrently and not consecu-

tively; and it is further ordered by the Court that should an appeal be taken the defendant is required to pay to the Clerk of the District Court, in escrow, one-half of the $6,000.00 fine, or the sum of $3,000.00, in cash, under Rule 5 of the Rules of Practice and Procedure in Criminal cases, as amended; and Morris Lavine, Esq., having thereupon requested the Court to suspend the jail portion of the sentence on condition that the fine is paid (to which there is no ruling), and Attorney George R. Maury, Esq., having informed the Court that if an appeal is prosecuted with diligence that an appeal bond in the sum of $5,000.00 would be satisfactory to the Government suspending the execution of the jail sentence only pending the outcome of the appeal, provided, however, that one-half of the $6,000.00 fine, or $3,000.00, is placed in escrow meanwhile, as aforesaid, it is by the Court ordered, that bond on appeal be fixed in the sum of $5,000.00, guaranteeing his appearance for execution of the jail sentence if the judgment of the District Court is affirmed on appeal; that as a condition precedent to said appeal the defendant, Edward F. Zap, is required to pay to the Clerk of the Court, in escrow, one-half of the $6,000.00 fine, or $3,000.00, in cash, as aforesaid, but that it will not be necessary for the appeal bond to guarantee the payment of the remaining $3,000.00 imposed as a fine in case the judgment of the District Court is affirmed; and the Bonding Company having entered into a stipulation in writing (which is filed this date) that the defendant could have a five day

stay of execution of the jail sentence only, and that the present bond should remain in effect meanwhile, it is by the Court ordered that said defendant have a stay of execution on the prison sentence to April 27, 1943, at 4:30 P. M., and the Court declares a recess at 11:50 o'clock A. M.; and thereupon, at the hour of 1:16 o'clock P. M., the Court having reconvened and all being present as before, [63] except Miss Sadie B. Arbuthnot and the Court Reporter, who are both absent, Attorney Lavine moves the Court to suspend the execution of the jail sentence, allowing the fine to remain in effect in event an appeal is taken, or to place the defendant on probation for nine months or for a longer period of time; and Attorney Maury having informed the Court that the Government did not wish to be placed in the position of bargaining with the defendant, that the sentence was heretofore pronounced at the morning session of the Court, that the Government did not wish to place the defendant in a position where the jail sentence is contingent upon his not paying the fine, and that before the Government could consent to a proposed amendment of the sentence, as Attorney Lavine proposes it, as aforesaid, that it would be necessary for him to get the consent of his superiors in the Department of Justice in Washington, no ruling is made on the modification of sentence at this time; and it appearing to the Court that the Government would consent to a further

stay of execution of the prison sentence only, provided the bonding company would consent thereto, in writing, it is by the Court ordered that a further stay of execution of the prison sentence of nine months only be granted to defendant, Edward F. Zap, to June 2, 1943, provided that the bonding company will consent in writing that the present bond of Edward F. Zap for $7,500.00 remain in force until that time, which consent was filed under date of April 22, 1943, continuing the present bond of Edward F. Zap in force until June 2, 1943, at 4:30 P. M.

The judgment and commitment, as signed by the Court, is as follows, to-wit:

[Title of District Court and Cause.]

JUDGMENT AND COMMITMENT
ON COUNTS 1, 4 AND 5

On this 22nd day of April, 1943, came the United States Attorney, and the defendant Edward F. Zap appearing in proper person, and with his attorney, Morris Lavine, and

The defendant having been convicted on verdict of the jury of the [64] offense charged in the indictment in the above-entitled cause, to wit: On or about September 23rd, 1942, at Los Angeles, Calif., knowingly, wilfully and feloniously making and presenting for payment to an officer in the Naval Service of USA a false claim; On or about October 16, 1942, at

Los Angeles, Calif., knowingly, etc., making and presenting for payment to Disbursing Officer, Bureau of Supplies, and Accounts, U. S. Navy, San Diego, a false claim, etc., and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the County Jail type to be designated by the Attorney General or his authorized representative for the period of nine months on each of the first, fourth, and fifth counts of the indictment, sentence to begin and to run concurrently, and not consecutively; and in addition thereto, paying unto the United States of America a fine in the sum of two thousand dollars on each of said three counts, making a total fine of six thousand dollars.

It is further ordered that a stay of execution on the jail sentence be had until June 2, 1943 at 10:00 o'clock A. M., provided the consent of the bonding company is obtained thereto in writing.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other

qualified officer and that the same shall serve as the commitment herein.

J. F. T. O'CONNOR
United States District Judge

Filed Apr. 22, 1943.
Edmund L. Smith, Clerk,
By Francis E. Cross, Deputy Clerk.

Note: On April 22nd, 1943, the bonding company having consented thereto in writing, the court entered a minute order that defendant Zap have a stay of execution on the jail sentence only to April 27th, 1943, at 4:30 P. M. [65]

District Court of the United States
Southern District of Calif.
Central Division

No. 15,728

Criminal Indictment in thirteen counts for violation of U. S. C., Title 18, Secs. 80 and 83

UNITED STATES

v.

EDWARD F. ZAP

JUDGMENT AND COMMITMENT
ON COUNTS 1, 4 AND 5

On this 22nd day of April, 1943, came the United States Attorney, and the defendant Edward F. Zap

appearing in proper person, and with his attorney, Maurice Lavine, and

The defendant having been convicted on verdict of the jury of the offense charged in the indictment in the above-entitled cause, to wit: On or about September 23rd, 1942, at Los Angeles, Calif., knowingly, wilfully and feloniously making and presenting for payment to an officer in the Naval Service of USA a false claim; On or about October 16, 1942, at Los Angeles, Calif., knowingly, etc., making and presenting for payment to Disbursing officer, Bureau of Supplies and Accounts, U.S. Navy, San Diego, a false claim, etc., and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the County Jail type to be designated by the Attorney General or his authorized representative for the period of nine months on each of the first, fourth, and fifth counts of the indictment, sentences to begin and to run concurrently, and not consecutively; and in addition thereto paying unto the United States of America a fine in the sum of two thousand dollars on each of said three counts, making a total fine of six thousand dollars.

It is further ordered that a stay of execution on

the jail sentence be had until June 2, 1943 at 10:00 o'clock A. M. provided the consent of the bonding company is obtained thereto in writing.

Note: On April 22nd, 1943, the bonding company having consented thereto in writing, the court entered a minute order that defendant Zap have a stay of execution on the jail sentence only to April 27th, 1943, at 4:30 p. m.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) J. F. T. O'CONNOR
United States District Judge

[Endorsed]: Filed this 22nd day of April, 1943. Edmund L. Smith, Clerk. By Francis E. Cross, Deputy Clerk. [66]

(Printer's Note): Motion for New Trial is not set forth in this printed transcript of record at this point, as it is in the Bill of Exceptions. The document is set forth at page 216 herein.

(Printer's Note): Motion in Arrest of Judgment is not set forth in this printed transcript of record at this point, as it is in the Bill of Exceptions. The document is set forth at page 219 herein.

(Printer's Note): Notice of Appeal is not set forth in this printed transcript of record at this point, as it is in the Bill of Exceptions. The document is set forth at page 224 herein.

MINUTE ORDER OF MAY 26, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 26th day of May in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming on for further proceedings: George Maury, Esq. and Miss Sadie Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; Morris Lavine, Esq., appearing as counsel for the defendant, who is present: Marie G. Zellner, Court Reporter, being present and reporting the proceedings: Attorney Lavine makes a statement and moves for reduction of bail of Zap pending appeal from $5,000.00 to $3,000.00; Attorney Maury consents thereto, and the Court orders motion to reduce bonds granted.

[76]

MINUTE ORDER OF MAY 28, 1943

At a stated term, to-wit: The February Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday the 28th day of May in the year of our Lord one thousand nine hundred and forty-three.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

This cause coming before the Court at the hour of 10:40 A. M. for further proceedings relative to the modification of sentence heretofore pronounced upon the defendant Edward F. Zap; George R. Maury, Esq., Walter S. Binns, Esq., James Harrington, Esq., and Miss Sadie B. Arbuthnot, Special Assistants to the Attorney General, appearing for the Government; the defendant, Edward F. Zap, being present in Court with his attorney, Morris Lavine, Esq.; there being no court reporter present; Attorney Lavine makes a statement to the Court in behalf of the said defendant, and the defendant Edward F. Zap having made a statement to the Court, and it appearing that this case is now on appeal and that the Court has no jurisdiction to take further proceedings at this time, no ruling is made. [77]

[Title of District Court and Cause.]

BAIL BOND ON APPEAL

Bond No. 824-0014

Know All Men by These Presents:

That we, Edward F. Zap as Principal, and the Northwest Casualty Company, a Washington corporation, as surety, are jointly and severally held firmly bound unto the United States of America in the sum of Three Thousand ($3,000.00) Dollars, for the payment of which sum we and each of us bind ourselves, our heirs, executors, administrators and assigns.

The condition of the foregoing obligation is as follows:

Whereas, lately, to-wit, on the 22nd day of April, 1943, at a term of the District Court of the United States, in and for the Southern District of California, Central Division, in an action pending in said Court in which the United States of America is Plaintiff, and Edward F. Zap was Defendant, judgment and sentence was made, given, rendered and entered against the said defendant in the above entitled action, whereas he was convicted as charged in the indictment:

Whereas, in said judgment and sentence, so made, given, rendered and entered against said Edward F. Zap, it was ordered and adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the Jail Type, to be designated by the At-

torney General or his authorized representative for a period of nine months on each of counts one, four and five of the indictment, [78] said sentence to run concurrently; and to pay unto the United States of America a fine of Two Thousand Dollars ($2,000.00) on counts one, four and five of said indictment or a total of Six Thousand Dollars ($6,000.00).

Whereas, the said Edward F. Zap, has filed notice of appeal from the said conviction and from the said judgment and sentence, appealing to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, the said Edward F. Zap, has been admitted to bail pending the decision upon said appeal, in the sum of Three Thousand Dollars ($3,000.00).

Now therefore, the conditions of this obligation are such that if said Edward F. Zap shall appear in person, or by his attorney, in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause in said Court and prosecute his appeal; and if the said Edward F. Zap shall abide by and obey Court orders by the said United States Circuit Court of Appeals for the Ninth Circuit, and if the said Edward F. Zap shall surrender himself in execution of said judgment and sentence, if the said judgment and sentence is affirmed by the United States Circuit Court of Appeals for the Ninth Circuit; and if the said Edward F. Zap will appear for trial in the District Court of the United States,

in and for the Southern District of California, Central Division, on such day or days as may be appointed for retrial by said District Court, if the said judgment and sentence against him be reversed, then this obligation shall be null and void; otherwise to remain in full force and effect.

This recognizance shall be deemed and construed to contain the "express agreement", summary judgment and execution thereon, mentioned in Rule 13 of the District Court.

EDWARD F. ZAP
Principal
10974½ Wilshire Blvd., W. Los Angeles
(Address)

NORTHWEST CASUALTY COMPANY, a Washington Corporation, [79]
By A. W. APPEL
Its Attorney-in-Fact
Surety

State of California,
County of Los Angeles—ss.

On this 28th day of May, A. D. 1943, before me, Marva Weede, a Notary Public in and for the County and State aforesaid, duly commissioned and sworn, personally appeared A. W. Appel, Attorney-in-Fact of the Northwest Casualty Company, a Washington corporation, to me personally known to be the individual and officer described in and who executed the within instrument, and he acknowl-

edged the same, and being by me duly sworn, deposes and says that he is the said officer of the Company aforesaid, and the seal affixed to the within instrument is the corporate seal of said Company, and that the said corporate seal and his signature as such officer were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City of Los Angeles, County of Los Angeles, the day and year first above written.

MARVA WEEDE

Notary Public in and for the County of Los Angeles, State of California.

Approved as to form.

JAMES E. HARRINGTON

Special Assistant to Attorney General

I hereby certify that I have examined the within bond and that in my opinion the form thereof is correct and surety thereon is qualified.

MORRIS LAVINE

Attorney for Defendant and Appellant

The foregoing bond is approved this 1st day of June, 1943.

J. F. T. O'CONNOR

United States District Judge

[80]

[Endorsed]: Filed Jun. 1, 1943. [81]

In the United States Circuit Court of Appeals
for the Ninth Circuit

Morris Lavine,
620 Bartlett Bldg.,
Los Angeles, Calif.,
TR 3241
Attorney for Appellant.

No.

EDWARD F. ZAP,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

AFFIDAVIT FOR ENLARGEMENT OF TIME

State of California,
County of Los Angeles—ss.

Morris Lavine, being first duly sworn, deposes and says:

That he is the attorney for the appellant in the above-entitled case; that notice of appeal was duly and regularly filed in this case on April 26, 1943; that it is necessary to prepare a bill of exceptions in connection with this appeal; that the last day on which the bill of exceptions may be lodged and engrossed by the District Judge would be May 25, 1943, unless the time is further enlarged by the District Court at this time; that the trial judge, J. F. T. O'Conner, has left for Washington, D. C., and that

he continued other matters in the case because of his absence from the city, to June 2, 1943; that there are almost 2,000 pages of reporter's transcript, and that additional sections are being transcribed in regard to preliminary proceedings in the case, and that these have as yet not been transcribed by the court reporter and furnished to counsel;

That in order properly to prepare the bill of exceptions affiant believes that it will be necessary to have to and including July 15, 1943, to lodge the bill of exceptions. [82]

Wherefore, affiant prays that this Honorable Court allow additional time to and including July 15th within which to lodge the bill of exceptions and to and including July 30th, 1943, for the District Court to approve and engross the same.

Dated: May 5, 1943.

MORRIS LAVINE

Subscribed and sworn to before me this 7th day of May, 1943.

PAUL P. O'BRIEN
Clerk, U. S. District Court of Appeals
for the Ninth Circuit

Copy of the within affidavit received this 11th day of May, 1943.

JAMES E. HARRINGTON, et al.
Attorneys for Appellees

[Endorsed]: Filed May 21, 1943. [83]

[Title of Circuit Court of Appeals and Cause.]

ORDER ENLARGING TIME TO LODGE BILL OF EXCEPTIONS

It appearing that the record in the above-entitled case is almost 2,000 pages, and that additional sections are being transcribed in regard to preliminary proceedings which have not as yet been furnished to counsel for the appellant, and good cause appearing therefor,

It is ordered that the time within which appellant may lodge his bill of exceptions with the Clerk of the District Court of the Southern District of California be, and it hereby is extended to and including June 1, 1943, and to and including June 15, 1943, for the District Court to approve and engross the same.

Dated: May 11th, 1943.

PAUL J. McCORMICK
Judge

Copy of the within Order received this 11th day of May, 1943.

JAMES E. HARRINGTON, et al.
Attorneys for Appellees

[Endorsed]: Filed May 21, 1943. [84].

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the District Court of the United States, Southern District of California, Central Division:

You will please prepare the following record in the above-entitled cause for the Ninth Circuit Court of Appeals:

1. Indictment;
2. Demurrer;
2A. All Court's minutes on all proceedings;
3. Minutes of the Court's ruling on the demurrer;
4. All Clerk's minutes of proceedings;
5. Rulings on motions to suppress evidence;
6. Rulings on motions to return evidence;
7. Motion in arrest of judgment;
8. Minutes of ruling on motion to suppress evidence;
9. Judgment;
10. Motion for new trial;
11. Minutes on ruling on motion for new trial;
12. Stipulation and order for transmission of exhibits;
13. All original exhibits to which a stipulation was entered; [86]
14. All extensions of time to settle and engross bill of exceptions;
15. Bill of exceptions;
16. This praecipe.

MORRIS LAVINE
Attorney for Defendant
and Appellant

[Endorsed]: Filed Dec. 20, 1943. [87]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 87 inclusive contain full, true and correct copies of: Indictment; Minute Orders Entered November 25, 1942, November 27, 1942, November 28, 1942, November 30, 1942, and December 7, 1942 respectively; Demurrer to Indictment; Minute Orders Entered December 18, 1942, December 21, 1942, January 12, 1943, March 15, 1943, March 24, 1943, April 6, 1943, April 7, 1943, April 8, 1943, April 9, 1943, April 12, 1943, April 13, 1943, April 14, 1943, April 15, 1943, April 16, 1943 and April 19, 1943 respectively; Verdict of the Jury; Minute Order Entered April 22, 1943; Judgment and Commitment; Motion for New Trial; Motion in Arrest of Judgment; Notice of Appeal; Minute Orders Entered May 26, 1943 and May 28, 1943 respectively; Bail Bond on Appeal; Affidavit for Enlargement of Time; Order Enlarging Time to Lodge Bill of Exceptions and Praecipe, which together with the Original Bill of Exceptions, Assignment of Errors and Original Exhibits constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $35.60, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 12 day of February, 1944.

EDMUND L. SMITH,
Clerk.
By THEODORE HOCKE.
[Seal] Deputy Clerk.

At a stated term, to-wit: The October Term 1942, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Thursday the twenty-seventh day of May in the year of our Lord one thousand nine hundred and forty-three.

Present: Honorable Curtis D. Wilbur, Senior Circuit Judge, Presiding, Honorable Francis A. Garrecht, Circuit Judge, Honorable William Healy, Circuit Judge.

No. 10419

EDWARD F. ZAP,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

ORDER EXTENDING TIME TO FILE AND SETTLE BILL OF EXCEPTIONS AND TO FILE ASSIGNMENTS OF ERROR

Upon consideration of the motion of Mr. Morris Lavine, and of his affidavit in support thereof, and

of the consent of Messrs. James E. Harrington and George R. Maury, Special Attorneys, Department of Justice, counsel for appellee, and good cause therefor appearing,

It is ordered that the time within which appellant may lodge his proposed bill of exceptions in above cause in the District Court be, and hereby is extended to and including July 15, 1943; that the appellee may have to and including July 24, 1943 within which to propose any amendments thereto, and that the time within which the bill of exceptions may be settled and filed, and the assignments of error filed is extended to and including July 30, 1943.

[Endorsed]: Filed May 29, 1943.

At a stated term, to wit: The October Term 1942, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the twelfth day of June in the year of our Lord one thousand nine hundred and forty-three.

Present: Honorable Francis A. Garrecht, Circuit Judge, Presiding, Honorable Clifton Mathews, Circuit Judge.

[Title of Cause.]

ORDER EXTENDING TIME TO FILE AND SETTLE BILL OF EXCEPTIONS, ETC.

Upon consideration of the motion of Mr. Morris Lavine, counsel for appellant, and supporting affidavit, and good cause therefor appearing, It Is Ordered that the time within which appellant may lodge his proposed bill of exceptions and file his assignments of error herein be, and hereby is extended to and including August 16, 1943; that the appellee may have to and including August 26, 1943, within which to propose any amendments thereto, and that the District Court may have to and including August 30, 1943 within which to settle and file the bill of exceptions.

[Endorsed]: Filed Jul. 13, 1943.

At a stated term, to wit: The October Term 1942, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday the first day of October in the year of our Lord one thousand nine hundred and forty-three.

Present: Honorable Francis A. Garrecht, Circuit Judge, Presiding, Honorable William Denman, Circuit Judge, Honorable Clifton Mathews, Circuit Judge.

[Title of Cause.]

ORDER EXTENDING TIME TO FILE AND SETTLE BILL OF EXCEPTIONS

Upon consideration of the application of Mr. Morris Lavine, counsel for appellant, and his supporting affidavit, and good cause therefor appearing, It Is Ordered that the time within which the appellant may lodge his proposed bill of exceptions in this cause be, and hereby is extended to and including October 21, 1943; that the appellee may have to and including November 8, 1943, within which to propose any amendments thereto, and that the time within which the bill of exceptions may be settled and filed be, and hereby is extended to and including November 16, 1943.

[Endorsed]: Filed Oct. 2, 1943.

[Title of Circuit Court of Appeals and Cause.]

State of California,
County of Los Angeles—ss.

Morris Lavine, being first duly sworn, deposes and says:

That appellant's proposed bill of exceptions is due to be lodged in the United States District Court on October 21, 1943, with 15 days thereafter for the Government to propose amendments thereto, and five days thereafter for the Court to settle the same.

That the bill of exceptions is all typed and is in the process of being assembled, but that appellant's

assignments of error have not been completed: that the bill of exceptions runs well over 400 pages and the assembling of the same will require quite some time.

Wherefore, affiant prays that this Honorable Court extend the time in which to lodge the said bill of exceptions and file the assignments of error to and including October 25, 1943; that the Government may have 15 days thereafter to propose amendments and exceptions, and that the Court have five days thereafter to settle the bill of exceptions.

MORRIS LAVINE

Subscribed and sworn to before me this 21st day of October, 1943.

LUCILE TOWLES SUTHERLAND
Notary Public in and for said County and State

So ordered.

CURTIS D. WILBUR
CLIFTON MATHEWS
ALBERT LEE STEPHENS
United States Circuit Judges

[Endorsed]: Filed Oct. 22, 1943. Edmund L. Smith, Clerk. By Irwin Hames, Deputy Clerk.

[Endorsed]: Filed Oct. 21, 1943. Paul P. O'Brien, Clerk.

A true copy.
Attest, October 21, 1943.

PAUL P. O'BRIEN,
Clerk.

[Seal]

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated by and between the Government and the appellant, through their respective counsel, that the refused instructions of the appellant may be filed October 26, 1943, as a part of appellant's bill of exceptions.

Dated: October 25, 1943.

GEORGE R. MAURY
Special Attorney
War Frauds Division
By GEORGE R. MAURY
Attorney for Appellee
MORRIS LAVINE
By MILTON B. SAFIER
Attorney for Appellant

So ordered Oct. 25, 1943.

ALBERT LEE STEPHENS
CLIFTON MATHEWS
CURTIS D. WILBUR
Circuit Judges

[Endorsed]: Filed Nov. 1, 1943. Edmund L. Smith, Clerk. By L. Wayne Thomas, Deputy Clerk.

[Endorsed]: Order, etc. Filed Oct. 25, 1943. Paul P. O'Brien, Clerk.

A true copy.
Attest: November 1, 1943.

PAUL P. O'BRIEN
Clerk
By FRANK H. SCHMID
Deputy Clerk.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT FOR ENLARGEMENT OF TIME

United States of America,
Southern District of California,
Central Division—ss.

George R. Maury, being first duly sworn, deposes and says:

That he is the attorney for the United States charged with the duty of preparing the appellee's proposed amendments to the appellant's Bill of Exceptions. That heretofore and on the 25th day of October 1943 the appellant's proposed Bill of Exceptions was served upon appellee and lodged in the office of the Clerk of the United States District Court in and for the Southern District of California, Central Division.

That your affiant has diligently endeavored to complete the Government's proposed amendments thereto, and has since the 25th day of October 1943 devoted his time to nothing else. In order to completely present all of the evidence, it is necessary, from both the point of view of lawyer's time involved and the stenographic time involved that the appellee be granted more time in which to prepare and complete the Government's proposed amendments and exceptions thereto. That said Bill of Exceptions runs to over six hundred pages, and that, as your affiant is informed and believes, the proposed amendments thereto will exceed one hundred and fifty pages.

Wherefore, affiant prays that this Honorable Court extend the time in which the appellee may

lodge its proposed amendments and exceptions thereto to and until the 30th day of November 1943, and that the District Court have five days thereafter to settle the Bill of Exceptions.

GEORGE R. MAURY

Subscribed and sworn to before me this 8th day of November, 1943.

EDMUND L. SMITH
Clerk of the United States District Court for the Southern District of California
By IRWIN HAMES
Deputy

Service of a copy of the foregoing affidavit acknowledged this 8th day of November, 1943. The appellant consents to the within requested extension of time.

MORRIS LAVINE
Attorney for Appellant

It is so ordered; November 8, 1943.

CURTIS D. WILBUR
ALBERT LEE STEPHENS
Judges, United States Circuit Court of Appeals for the Ninth Circuit

[Endorsed]: Filed Nov. 12, 1943.

[Endorsed]: Filed Nov. 10, 1943. Paul P. O'Brien, Clerk.

A true copy.
Attest: Nov. 10, 1943.

PAUL P. O'BRIEN
[Seal] Clerk

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

Whereas, the Government's and the defendant's exhibits in evidence in the above entitled action, which are on file in the office of the Clerk of the United States District Court, Southern District of California, Central Division, are in many instances very difficult, and in some cases impossible, to reproduce either by typewriting or by printing, and, in many instances, are extremely long documents, which would be very expensive to typewrite and to print, and

Whereas, the exhibits contain matters, which both parties desire the Court to see in their original form, and

Whereas, some of said exhibits contain notations in the handwriting of various persons in the margins of the typewritten or printed documents, and erasures, which both parties believe should be certified directly to the United States Circuit Court of Appeals for the Ninth Circuit by the District Court for the purposes of this appeal, and

Whereas, there are over 100 photographs among said exhibits in evidence, and

Whereas, Government's Exhibits 34 to 45 in evidence, inclusive, consist of virtually the entire set of books of account, including journals, ledgers, payroll ledgers, check records, cash records, and several hundred cancelled checks, etc., which were kept as the books of account of the defendant's business, and

Whereas, both the appellant and appellee desire

to avoid the expense of copying and re-photographing all of these bodily into the Bill of Exceptions, and the expense of reproducing said photographs in the printing thereof.

Now, therefore,

It is hereby stipulated and agreed by and between the appellant, Edward F. Zap, and the appellee, United States of America, by and through their respective attorneys, subject, nevertheless, to the approval of the United States Circuit Court of Appeals for the Ninth Circuit, as follows:

1. That each and all of the hereinafter mentioned and designated exhibits in evidence, which are herein referred to respectively by the numbers given them by the Clerk of said District Court at the time of the trial herein, may be deemed by reference to be incorporated in the Bill of Exceptions both generally and respectively where and wherever references are made to them by such numbers in the body and context of said Bill of Exceptions to the same effect and purport as though each and all of said exhibits were fully set forth, word for word, figure for figure, and picture for picture in said Bill of Exceptions;

2. That the District Court may, after passing upon appellee's proposed amendments thereto, sign and settle said Bill of Exceptions, and may include therein a copy of this stipulation in lieu of including therein, either in substance or in full, copies of each and all of the hereinafter designated exhibits in evi-

dence, and that thereupon, each of said exhibits shall be deemed to be included in said Bill of Exceptions to the same effect and purport as though each and all of said exhibits were fully set forth therein as aforesaid;

3. That the exhibits to be so included, which are hereby so designated by the appellant are as follows:

Defendant's Exhibits A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, FF, GG, HH, II, JJ, KK, LL, MM, NN, PP, QQ, RR, TT, UU, VV, WW, XX, YY, ZZ.

Government's Exhibits 1, 58.

4. That the exhibits to be so included which are hereby designated by the appellee are as follows:

Government's Exhibits 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 21, 23, 26, 27, 30, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 51, 52, 53.

5. That the United States District Court in and for the Southern District of California may make an order that all of the foregoing designated exhibits be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and for the safekeeping, transportation, and return thereof, at the cost of the appellant, to be paid to the Clerk of said District Court upon demand;

6. This stipulation in no wise constitutes a waiver of any objections and exceptions to the introduction of any exhibits by the District Court.

Dated: November 10th, 1943.

JAMES E. HARRINGTON
Special Assistant to the Attorney General
GEORGE R. MAURY
Special Attorney
Attorneys for Appellee
MORRIS LAVINE
Attorney for Appellant

It is so ordered.

November 12th, 1943.

ALBERT LEE STEPHENS (Sig.)
Judge of the United States Circuit Court
of Appeals for the Ninth Circuit

[Endorsed]: Filed Nov. 12, 1943. Paul P. O'Brien, Clerk.

A true copy.

Attest: Nov. 18, 1943.

PAUL P. O'BRIEN
Clerk

MEMORANDUM OF POINTS AND AUTHORITIES

The Appellate Court will review evidence in a proper case only when evidence is contained in a Bill of Exceptions, or otherwise authenticated as having been used before the trial court.

Lee Won Jeong v. United States (C.C.A. 9), 145 F. 512;

Thompson v. United States (C.C.A. 9), 202 F. 401, 405.

"From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal."

Rule 4, Rules of Practice and Procedure after Plea of Guilty, Verdict or Finding of Guilt, in Criminal Cases brought in the District Courts of the United States, etc.

Where the parties stipulated thereto and the District Judge so ordered, the inclusion of certain exhibits in the Bill of Exceptions by reference only, in order that they might be sent directly to the Appellate Court, was sufficient, and the Circuit Court of Appeals should have considered the issues before it on the Bill of Exceptions as containing all the evidence below, and dismissal for lack of it was erroneous.

Krauss Bros. Lumber Co. v. Mellon, etc., 276 U.S. 386, 48 S.Ct. 358.

[Endorsed]: Filed Nov. 18, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT FOR ENLARGEMENT OF TIME

United States of America,
Southern District of California,
Central Division—ss.

George R. Maury, being first duly sworn, deposes and says:

That he is the attorney for the United States charged with the duty of preparing the appellee's proposed amendments to the appellant's Bill of Exceptions. That heretofore and on the 25th day of October 1943 the appellant's proposed Bill of Exceptions was served upon appellee and lodged in the office of the Clerk of the United States District Court in and for the Southern District of California, Central Division.

That your affiant has diligently endeavored to complete the Government's proposed amendments thereto, and has since the 25th day of October 1943 devoted his time to nothing else. In order to completely present all of the evidence, it is necessary, from both the point of view of lawyer's time involved and the stenographic time involved that the appellee be granted more time in which to prepare and complete the Government's proposed amendments and exceptions thereto. That said Bill of Exceptions runs to over six hundred pages, and that, as your affiant is informed and believes, the proposed amendments thereto will exceed one hundred and fifty pages.

Wherefore, affiant prays that this Honorable Court extend the time in which the appellee may lodge its proposed amendments and exceptions thereto to and until the 30th day of November, 1943, and that the District Court have five days thereafter to settle the Bill of Exceptions.

GEORGE R. MAURY

Subscribed and sworn to before me this 8th day of November, 1943.

EDMUND L. SMITH
Clerk of the United States District Court
for the Southern District of California
By IRWIN HAMES
Deputy

Service of a copy of the foregoing affidavit acknowledged this 8th day of November, 1943. The appellant consents to the within requested extension of time.

MORRIS LAVINE
Attorney for Appellant

It is so ordered: November 8, 1943.

CURTIS D. WILBUR
ALBERT LEE STEPHENS (Sig.)
Judges, United States Circuit Court
of Appeals for the Ninth Circuit

[Endorsed]: Filed Nov. 10, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER ENLARGING TIME

Upon reading the affidavit of Morris Lavine, and good cause appearing therefor,

It is ordered that the time within which appellant's proposed bill of exceptions may be signed and settled be enlarged to and including December 20, 1943.

Dated: November 27, 1943.

ALBERT LEE STEPHENS
Judge

CURTIS D. WILBUR
Senior United States Circuit Judge

FRANCIS A. GARRECHT
United States Circuit Judge

[Endorsed]: Filed Dec. 3, 1943. Paul P. O'Brien, Clerk.

A true copy.
Attest: Dec. 3, 1943.

PAUL P. O'BRIEN
Clerk.

[Seal]

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT FOR ENLARGEMENT OF TIME

State of California,
County of Los Angeles—ss.

Morris Lavine, being first duly sworn, deposes and says:

That he is the attorney for the appellant herein; that the appellee has filed proposed corrections and amendments to the proposed bill of exceptions and that the date within which the same must be signed and settled is fixed for December 6, 1943.

That the proposed amendments of appellee consist of several typewritten pages; that these proposed amendments, if adopted, will require considerable time to prepare and type, and that it is physically impossible to have the same prepared and settled within the time now fixed.

Wherefore, affiant prays that the time within which appellant may have the proposed bill of exceptions signed and settled be enlarged to and including December 30, 1943.

MORRIS LAVINE

Subscribed and sworn to before me this 27 day of November, 1943.

ZOA L. ZACCHE
Notary Public in and for said County and State

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT AND ORDER ENLARGING TIME

State of California,
County of Los Angeles—ss.

Morris Lavine, being first duly sworn, deposes and says:

That he is the attorney for the above named ap-

pellant; that the time within which to settle and engross the bill of exceptions has been fixed for December 20, 1943; that on December 13, 1943, a hearing was held before the Hon. J. F. T. O'Connor to settle the proposed Bill of Exceptions and amendments proposed thereto; that the government's proposed amendments constituted additions of or corrections involving more than 112 pages of typewriting; that affiant has had two stenographers working on same since that date and it may be physically impossible to complete the proposed corrections and matters within the time fixed by law; that other than such corrections the Bill of Exceptions is completed and ready for engrossing; that affiant, because of the Christmas holidays intervening, requests until and including December 29, 1943 within which to complete and have engrossed the Bill of Exceptions.

MORRIS LAVINE

Subscribed and sworn to before me this 19th day of December, 1943.

CHAS. W. FRICKE
Judge of the Superior Court

Upon reading the affidavit of Morris Lavine, and good cause appearing therefore, the time within which to engross and settle the Bill of Exceptions is enlarged to and including Dec. 29, 1943.

December 20, 1943.

ALBERT LEE STEPHENS
Circuit Judge
CURTIS D. WILBUR
Circuit Judge

[Endorsed]: Order, etc. Filed December 28, 1943. Paul P. O'Brien, Clerk.

A true copy.
Attest: December 28, 1943.
PAUL P. O'BRIEN
Clerk

[Title of District Court and Cause.]

BILL OF EXCEPTIONS LODGED

[Title of District Court and Cause.]

To James E. Harrington and George R. Maury, Special Assistants to the Attorney General:

Please take notice that the within proposed Bill of Exceptions will be brought on for settlement in the District Court of the United States, in and for the Southern District of California, Central Division, before the Honorable J. F. T. O'Connor, in his Court Room in the Federal Building, Los Angeles, California, on the 10th day of November, 1943, at ten o'clock A. M. on said date, or as soon thereafter as said matter can be heard.

Dated this 23d day of October, 1943.

MORRIS LAVINE
Attorney for Defendant
and Appellant

[Title of District Court and Cause.]

DEMURRER TO INDICTMENT

Comes now the defendant Edward F. Zap and demurs to the indictment upon the following grounds, to-wit:

I.

That the indictment and each count thereof does not state an offense against the laws of the United States.

II.

That the indictment and each count thereof fails to designate what crime or crimes have been committed and under what section of the code said crimes are alleged to have been committed, and therefore fails to apprize the accused of the nature and cause of the accusation.

III.

The indictment is duplicitous; it splits up one alleged offense into three alleged offenses in counts I, II and III; it splits up one alleged offense into three alleged offenses in counts IV, V and VI; it splits up one alleged offense into three alleged offense in counts VII, VIII and IX; it splits [1*] up one alleged offense into three alleged offenses in counts X, XI and XII, in violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

IV.

The indictment is vague, indefinite and uncertain

*Page numbering appearing at foot of page of original certified Bill of Exceptions.

in that it fails to specify in count I thereof what contracts designated as NXS-4105 and 83142 consisted of, and fails to specify with any degree of certainty what portion of said contracts would be paid by a fixed sum and what portion would be paid on the cost plus basis.

V.

The indictment is vague, indefinite and uncertain in failing to set forth the alleged claim and in failing to set forth in what manner or means the claim purported to be for the conducting of wind tunnel tests by the University of Washington and how and in what manner said claims were knowingly false.

VI.

Count II of said indictment is vague, indefinite and uncertain in that it fails to set up the materiality of any fact alleged to have been falsified, concealed or covered up by trick, scheme and device, and fails to set up what bill was allegedly presented by the University of Washington for certain wind tunnel tests, or what bill was allegedly represented as having been presented by the University of [2] Washington.

Said count II is further vague, indefinite and uncertain in failing to set up the purported contract NXS 4105 and in failing to show that any claim was presented pursuant to said alleged false representations.

VII.

Count III of said indictment is vague, indefinite and uncertain in that it fails to show what alleged

false bill, receipt, voucher, roll, account, claim, certificate or affidavit was presented, and fails to show what statements, if any, in said false bill, receipt, voucher, roll, account, claim, certificate or affidavit contained fraudulent and fictitious statements.

Said count III further fails to specify what entries, if any, were apportioned and caused to be apportioned upon the books and records, or what books and records, if any, contained alleged false entries, and in what manner the said books and records falsely reflected or falsely represented that monies had been paid pursuant to contract NXs-4105 with the United States of America.

Said count fails to sperify what the entries were upon the said books and records which allegedly were false and which allegedly were not paid to the University of Washington, or to anyone else, in payment of said wind tunnel tests pursuant to contract NXs-4105, or any other contract. [3]

VIII.

Count IV of said indictment is vague, indefinite and uncertain in that it fails to sperify the terms of contract 83142, or in what manner said claim was false and fictitious under the terms thereof.

IX.

Count V of said indictment is vague, indefinite and uncertain in that it fails to set forth what material fact, if any, was falsified and concealed by trick, scheme and device, and fails to show that Hilton Byers was a person authorized to pass upon the said cost inspection.

X.

Count VI of said indictment is vague, indefinite and uncertain in that it fails to set up in what false bill, receipt, voucher, roll, account, claim, certificate or affidavit the defendant Edward F. Zap made alleged false and fictitious statements and entries, and fails to specify the terms of contract 83142.

XI.

Count VII of said indictment is vague, indefinite and uncertain in that it fails to specify the claim alleged to be false, and fails to specify the contents of contract 83142, and fails to specify in what manner a trip to Daggett, California, was made or by whom, or pursuant to what contract it was made for the purpose of making test flights. [4]

X.

Count VIII of said indictment is vague, indefinite and uncertain in that it fails to specify in what way defendant allegedly falsified, concealed and covered up by trick, scheme and device a material fact, and fails to specify the terms of contract 83412 or that said tests and designs were purportedly made under said contract.

XI.

Count IX of said indictment is vague, indefinite and uncertain in that it fails to specify the false bill, receipt, voucher, roll, account, claim, certificate and affidavit alleged to be false and fictitious, and fails to specify in what manner the said defendant did cause the said claim to be entered upon the

books and records of the said Edward F. Zap, and fails to specify the terms of said contract.

XII.

Count X of said indictment is vague, indefinite and uncertain in that it fails to specify the terms of contract 83142, and fails to specify in what private experiments the said "mock-ups" had been used by the defendant Edward F. Zap in place of the work of the United States Navy, and is a pure conclusion of the pleader.

XIII.

Count XI of the said indictment is vague, indefinite and uncertain in that it fails to specify exactly what part of said work was done for the United States Navy and exactly [5] what work was done on private experiments for the sum of $700.

XIV.

Count XII of said indictment is vague, indefinite and uncertain in that it fails to inform the defendant of the charge against him and fails to specify the alleged false bill, receipt, voucher, roll, account, claim, certificate and affidavit and to specify what statements contained therein are allegedly fraudulent and fictitious and fails to specify how or in what manner there was an apportionment upon the books of the said Edward F. Zap entries that were false and entries that were not false amounting to $1100 alleged to have been paid L. E. Reed, and fails to show in what way the said accounts were allegedly falsely reflected and represented upon said books.

That said count further fails to specify how or in what manner $700 of the money was expended for and on account of experiments for the account of Edward F. Zap, and fails to specify what experiments were being conducted for Edward F. Zap's own account.

XV.

Count XIII of said indictment is vague, indefinite and uncertain in that it fails to specify what receipts and vouchers were false and fictitious that were to be presented to the Naval Cost Accountants and what distributions, apportionments and allocations of expenses incurred by the said [6] Zap Company was false, and what portion of said accounts was on a fixed fee basis and what other portions were on a cost plus basis, and fails to specify which entries were false and which were true.

Said count is further vague, indefinite and uncertain in that it fails to inform the defendant of the charge against him and fails to specify the facts.

Said count further fails to specify what cost of labor performed by his employees was to be on the government account and what cost of labor was to be on his own account, and in what manner these charges were false and fictitious.

Said count further fails to specify what accounts or figures the said Lloyd Scott did certify to as correct and what charges of labor and expenses he certified to as correct which it is alleged incorrectly set forth allowable claims, and fails to specify what account or accounts the said Lloyd Scott did certify to.

Said count is further vague, indefinite and uncertain in that under its overt acts it fails to specify wherein the alleged claim for $25,440 was false and which part was true, and fails to specify the terms of contract NXs-4105.

Said count further fails to inform the defendant of the charge against him in connection with the second overt act which alleges that said Lloyd Scott falsely certified to the correctness of expenses incurred on a test trip to Daggett, California, and fails to specify wherein the said bill was [7] not a true and correct bill.

Wherefore, defendant prays that the demurrer to the indictment be sustained and that the indictment be quashed.

Dated: December 16, 1942.

MORRIS LAVINE
Attorney for Defendant

POINTS AND AUTHORITIES

Defendant is entitled to be informed of the nature and cause of the accusation against him.

United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588;

United States v. Hess, 124 U.S. 483, 31 L.Ed 516;

Foster v. United States, 253 Fed. 481;

Miller v. United States, 288 Fed. 817;

Boykin v. United States, 11 Fed.(2d) 484;

Sixth Amendment to United States Constitution.

A crime cannot be split up into parts. A prosecutor can carve but a single offense out of a transaction.

People v. Stephens, 79 Cal. 428, 432;
People v. Puppilo, 100 Cal. App. 559;
Braverman v. United States, 87 L.Ed. 83.

[Endorsed]: Filed December 16, 1942. [8]

[Title of District Court.]

No. 15728

United States of America

vs.

Edward F. Zap and Lloyd Scott

No. 15729

United States of America

vs.

Edward F. Zap

No. 15730

United States of America

vs.

Lloyd Scott

MINUTE ORDER

Judge Hollzer's Calendar, December 18, 1942

It appearing that in the above entitled cases the defendants have filed separately either demurrers or motions for bills of particulars, or both; it fur-

ther appearing that in support of such demurrers and motions for bills of particulars counsel for defendants have filed mere skeleton references to certain decisions; it further appearing that said demurrers and said motions for bills of particulars are set to be heard before this court on December 21, 1942, It Is Ordered:

That counsel for defendants serve and file, on or before December 28, 1942, briefs in support of the respective demurrers and motions for bills of particulars; that counsel for government have one week thereafter within which to serve and file answering briefs; that counsel for defendants [9] have four days thereafter within which to serve and file reply briefs.

It is further ordered that the hearing on said demurrers and motions for bill of particulars, be, when said matters are called on the calendar of this Court on December 21, 1942, continued to January 12, 1943, at 10 A. M.

Copies to counsel. [10]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR BILL OF PARTICULARS

To the Honorable United States Attorney for the Southern District of California, Central Division:

Please take notice that on Monday, December 21, 1942, at the hour of 10:00 A. M., or as soon there-

after as counsel can be heard, the defendant Edward F. Zap will petition the Honorable Harry A. Hollzer, Judge of the United States District Court, in the Federal Building at Temple and Spring streets, Los Angeles, California, for an order directing the United States Attorney to serve and file a bill of particulars in the above-entitled case, more particularly setting forth the following:

Count I

I.

The exact terms and provisions of contracts designated NXs-4105 and 83142, as well as the terms of any and all supplements to amendments of and or modifications of each of these contracts, written or oral, so that the defendant may [11] be able to determine the exact provisions of said contracts and the manner or means of payments by the United States Navy, and the sum or sums to be paid thereunder.

II.

The fixed sum or sums due for the work done pursuant to said contracts and the sum or sums due on the basis of cost plus a fixed fee.

III.

The time, the place and the circumstances under which said fixed fee was to be paid, and said cost plus fixed fee was to be paid; the time, the place and the circumstances of the experimental work to be done under said contracts.

IV.

The exact manner and method in which this defendant presented for payment *the* approval an alleged false claim, and the name of the officer to whom it is alleged the said false claim was presented.

V.

The exact nature of the wind tunnel tests by the University of Washington which it is alleged the defendant was to have conducted.

VI.

The exact and specific terms of the claim allegedly presented by the defendant Edward F. Zap. [12]

Count II

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

The exact trick, scheme and device and the exact false and fraudulent statement and representation allegedly made, and the exact bill presented in connection with contract NKs-4105; state in what manner the said representations were false; to state when and where and under what circumstances said falsity was known by this defendant.

Count III

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

Set out the exact entries upon the books and records which it is alleged were false.

Set out when and where said records were made and entered and who made the entries therein.

Set forth the alleged false bill, receipt, voucher, roll, account, claim, certificate and affidavit: set forth wherein said items were false and fraudulent.

Count IV

I.

The defendant reiterates his request for a bill of [13] particulars in every respect as set up in Count I.

II.

Set forth the name of the disbursing officer of the Bureau of Supplies and Accounts.

Set forth when and where said William H. McAvoy was paid and for what items of expense he was paid.

Set forth in detail the claim under contract 83142 and what portion or portions thereof it is alleged were false.

Count V

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

Set forth the exact alleged trick, scheme and device and the alleged material fact that was allegedly falsified and concealed.

Give the exact false and fraudulent statement and representation, and state wherein the same is false.

Give the exact duties of Hilton Byers.

Give the exact items for which William H. McAvoy was paid approximately $2,375.

Count VI

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

[14]

II.

Set forth the exact false bill, receipt, voucher, roll, account, claim, certificate and affidavit alleged to be false.

Set forth the false and fraudulent statement and entries alleged to be therein made and point out their falsity.

Give the exact manner, means and circumstances, and exact language used to induce William H. McAvoy to endorse a blank check.

Set forth the services that William H. McAvoy was to render as a test pilot pursuant to contract 83142, and the exact services which he did render and for which he received payment in the sum of $2,075.

Set forth the exact manner and means in which it is alleged that the costs of said contracts were to be determined and the exact manner and means in which they were to be submitted to the United States Navy.

Count VII

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

State who the disbursing officer of the United States Navy was to whom said, or any claim, was presented, the exact claim that was presented, and wherein it is alleged that it was false.

Set forth the exact terms and conditions, and any [15] modifications, oral or written, of contract 83142, and set forth the exact nature of the test flights that were to be made under said contract.

Count VIII

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

Specify the exact trick, scheme and device allegedly used, the material fact allegedly concealed and falsified, the alleged false and fraudulent statement and representation, and wherein said statement and representation were fraudulent.

Set forth the exact terms of contract 83142 and any alterations or modifications, oral or written.

Count IX

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

Set forth the exact false bill, receipt, voucher, roll, account, claim, certificate and affidavit alleged to be false and fraudulent.

Set forth what entries were purportedly reflected as having been incurred on a trip to Daggett, California; just what test was conducted pursuant to contract 83142, and what expenses were incurred in the sum of $600, and what expenses [16] were claimed in the sum of $1,260; wherein any entries were made which falsely represented to the naval cost inspector that the amounts therein expended were true, and wherein said representations were false.

Count X

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

Specify who the disbursing officer of the Bureau of Supplies and Accounts was to whom a false claim was presented.

Specify whether there was a contract with J. E. Reed, and whether such contract did include the construction and fabrication of model airplane work known as "mock-ups"; specify what private experiments said alleged "mock-ups" were used for, and specify whether, pursuant to any contracts with the Government, the defendant was required to construct "mock-ups."

Count XI

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

Specify wherein the defendant falsified and concealed any material fact: specify what material fact was falsified and concealed. [17]

Specify the nature of the trick, scheme and device alleged to have been used.

Specify what statements were made which it is claimed were false and fraudulent.

Specify the terms of contract 83142.

Specify whether L. E. Reed was to be paid any sums of money pursuant to a contract between the defendant and the United States Navy; specify what portion of said contract was performed; specify what portion of the work was covered by approximately $700; specify what private experiments it is claimed were carried on for $400.

Count XII

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

Specify the false bill, receipt, voucher, roll, account, claim, certificate and affidavit; specify wherein said items were false, fraudulent and fictitious.

Specify the exact terms of any agreement by which $1100 was to be paid, or any sum was to be paid to L. E. Reed.

Specify all contracts, written or oral, by which the defendant Edward F. Zap was to make any "mock-ups" and what the nature of the "mock-ups" was that he was engaged to make.

Specify in what manner Edward F. Zap knew that the said books and records of Zap would be presented to the United [18] States Navy, and when they were to be submitted to the United States Navy, and to whom in the United States Navy they were to be submitted.

Specify what it is alleged that $700 was expended for, precisely, and when and where it was expended and the nature of the experiments which it is alleged were conducted pursuant to said expenditure.

Count XIII

I.

The defendant reiterates his request for a bill of particulars in every respect as set up in Count I.

II.

Specify when and where the said defendants conspired, combined, confederated and agreed.

Specify who, if any, were the "divers other persons to the grand jury unknown."

Specify what false and fictitious entries it is alleged were made upon the books and records of Edward F. Zap, and who made the said false entries upon said books and records.

Specify who made false distributions, apportionments and allocations of expenses upon said books

and records, and upon whose instructions said alleged entries were made.

Specify just what portion of fees was to be paid as fixed fees, and what portion was to be paid as cost plus fixed fees; and specify how much was to be paid as a fixed fee and how much was to be paid as cost plus. [19]

Specify what claims and vouchers were false and set them out verbatim as it is allegedly claimed they were paid to the United States Navy.

Specify what costs were for labor which allegedly was performed by the employees on projects which were for the personal account of Edward F. Zap, and what costs were for labor performed on projects for the United States Navy, and specify which items were true and which it is claimed were false and fictitious.

Specify just what the instructions were which it is claimed the defendant Edward F. Zap gave, and to whom he gave them, and when and where.

Specify what bookkeepers of said Zap Company were instructed to charge expenses incurred for projects which were being performed on Zap's personal account, and when and where and in what manner said bookkeepers were instructed, and the exact instructions which were given.

Specify on what days or dates said charges were entered and wherein they were false in accordance with said alleged instructions.

Specify when and where and in what manner Lloyd Scott did certify to the correctness of the

aforesaid alleged incorrect entries and charges for labor costs, and specify when and where and in what manner the said Lloyd Scott became aware of and knew of said alleged incorrect entries.

Set forth when and where and in what manner the said [20] Lloyd Scott received sums of money and from whom, and set forth the manner, circumstances, times and places of the receipt of said monies.

Set forth the exact claim or voucher in the amount of $25,440 for labor and specify what portion of said voucher it is claimed falsely presented said claim, and wherein said claim is allegedly false.

Set forth the manner in which Lloyd Scott falsely certified the bill for a test trip to Daggett, California, and the exact claim alleged to have been presented and by whom it was certified and to whom it was presented and by whom it was approved.

MORRIS LAVINE
Attorney for Defendant
Edward F. Zap

Points and Authorities

A defendant in a criminal case is entitled to particularity of time, place, circumstances, etc.

Martin v. United States, 20 Fed.(2d) 785;
Dunlop v. United States, 165 U.S. 486, 41 L.Ed. 799;
Savage v. United States, 270 Fed. 14, 18;
Rosen v. United States, 40 L.Ed. 606.

[Endorsed]: Filed December 17, 1942. [21]

[Title of District Court and Cause.]

NOTICE OF MOTION

To Commander G. A. Smith and Ensign Minor of the United States Navy, and to United States District Attorney Leo Silverstein and Special Attorneys General Harrington and Binns:

Please take notice that on the 4th day of January, 1943, at the hour of 10 M., I shall move the District Court of the United States, in and for the Southern District of California, Central Division, the Honorable Harry Hollzer presiding, for an appropriate order for the return to Edward F. Zap of all papers, files, documents, records and pink slips which were taken from him by the United States Navy following the arrest of said Edward F. Zap.

Said motion will be based upon the records and files of this case and upon the letter of Commander G. A. Smith, U.S.N., to the Honorable Harry Hollzer, upon the affidavits of Edward F. Zap attached hereto, and upon the fact that such seizure and detention of the private papers, [22] documents, files, records and pink slips was and is without any lawful authority, and that any further detention of said property would be violative of the Fourth and Fifth Amendments to the Constitution of the United States and is not necessary nor lawful.

Dated: December 23, 1942.

MORRIS LAVINE
Attorney for Defendant
Edward F. Zap

[Endorsed]: Filed December 29, 1942. [23]

[Title of District Court and Cause.]

AFFIDAVIT OF EDWARD F. ZAP

State of California,
County of Los Angeles—ss.

Edward F. Zap, being first duly sworn, on oath deposes and says:

That he is the head of Edward F. Zap Aeronautical Engineers, located at 1005 Broxton Avenue, West Los Angeles, California; that he is under indictment in the above-numbered cases, and that said indictment is now pending in the District Court of the United States, in and for the Southern District of California, Central Division, the Honorable Harry Hollzer, presiding;

That Ensign Minor, Naval Cost Inspector, has in his possession certain files, records and documents, particularly C-4 and C-5 forms, certain naval forms and records, which were and are the property of your affiant, and that said Ensign Minor is holding said documents and records without any legal warrant or other lawful procedure; [105]

That your affiant needs these papers, records and documents returned to him for the necessary defense and protection of himself in the criminal case of United States of America vs. Edward F. Zap, Nos. 15728 and 15729, in the above-entitled court;

That affiant is informed and believes that said Ensign Minor will return said papers, records and documents to your affiant upon an order of this Honorable Court releasing the same.

Wherefore, affiant prays that this Honorable Court issue an order to show cause to the said Ensign Minor, directing him to show cause why he should not return the said papers, records and documents to your affiant, and to set a date, time and place for hearing on the same.

EDWARD F. ZAP

Subscribed and sworn to before me this 14th day of December, 1942.

D. MEYER

Notary Public in and for said County and State.

[Endorsed]: Filed December 29, 1942. [106]

[Title of District Court and Cause.]

AFFIDAVIT OF EDWARD F. ZAP

State of California,
County of Los Angeles—ss.

Edward F. Zap, being first duly sworn, on oath deposes and says:

That he is the head of Edward F. Zap Aeronautical Engineers, located at 1005 Broxton Avenue, West Los Angeles, California; that he is under indictment in the above-numbered cases, and that said indictment is now pending in the District Court of the United States, in and for the Southern District of California, Central Division, the Honorable Harry Hollzer presiding;

That affiant's files and records in the said case which were located at the above address, contain contracts and correspondence relating to business, the patent files, and two pink slips designating his ownership to certain automobiles; that subsequent to his arrest, and while he was in the Los Angeles County Jail, affiant is informed and [107] believes that certain persons connected with the United States Navy, acting under orders of Commander G. A. Smith of the United States Navy, took eleven boxes of files, records and documents belonging to your affiant; that affiant is informed and believes that subsequent to the taking of these files, records and documents, Commander Smith sent the following letter to the Honorable Harry Hollzer, judge presiding, and that said letter was in turn forwarded to the attorney for the government and to the attorney for your affiant:

"Office of
INSPECTOR OF NAVAL AIRCRAFT
Douglas Aircraft Co., Inc.
Santa Monica, Calif.

December 7, 1942

"The Honorable Harry Holzer
Federal Judge for the Southern
District of California
Federal Building,
Los Angeles, Calif.

"In connection with the E. F. Zap case, this is to inform you that, in order to protect Gov-

ernment property and general correspondence files which were without reasonable protection in the office of E. F. Zap, 1005 Broxton Avenue, West Los Angeles, California, I removed the above material and it is now placed in a bombproof and fireproof vault where it can be properly protected and safeguarded. This is to inform you that upon order of the Court, any part of the material described above will be released to the Court. Please give at least two days advance notice in order that we may open up the boxes and get the files or drawings desired. They will then be surrendered to the Court.

"I also wish to inform you that upon advice I hold two pink slips for automobiles made out to E. F. Zap. The reason I have held them has been to safeguard Government property, and I was informed that E. F. Zap had claimed [108] depreciation on these automobiles, or at least one of them, as a charge against the Navy; hence felt that I was justified in holding them. However, if directed by the Court, I will release either or both of the pink slips, as we have from the start been very careful not to interfere with the civil rights of E. F. Zap or any member of his organization.

"Very truly yours,

"G. A. SMITH

Comdr. USN (Ret)"

That affiant has talked to Commander Smith, and affiant's attorney, Morris Lavine, 620 Bartlett Building, Los Angeles, California, has also talked to Commander Smith, who has stated that he took the files, records, documents, pink slips, etc., and put them in a bombproof and fireproof vault for the protection of all persons concerned, including your affiant; that it is perfectly agreeable with Commander Smith to return any and all files, papers, records, documents, pink slips, etc., so seized, to affiant upon an appropriate order of this Court;

That said papers, records, documents, files, pink slips, etc., were not seized pursuant to any court process or other legal procedure, either military or civilian, and were taken solely for the protection and preservation of said records;

That your affiant needs these papers, records, documents, files, pink slips, etc., and therefore prays for an order of this Honorable Court requiring said Commander Smith to turn over to your affiant any and all papers, [109] records, documents, files and pink slips, etc., which were so taken.

EDWARD F. ZAP

Subscribed and sworn to before me this 14th day of December, 1942.

D. MEYER

Notary Public in and for said County and State.

[Endorsed]: Filed December 29, 1942. [110]

[Title of District Court and Cause.]

NOTICE OF MOTION

To George R. Maury, F. P. Harrington and Walter S. Binns, Special United States Attorneys, War Frauds Division, United States Attorney's Office:

You will please take notice, that upon the verified petition of Edward F. Zap, petitioner, duly verified this 4th day of March, 1943, upon the indictments found against the defendant, and upon all the proceedings had heretofore herein, and upon such affidavits and testimony as are filed and which may hereafter be presented on the hearing of this cause, a motion will be made in the courtroom of Judge Leon Yankwich, in the Federal Building, at Los Angeles, California, on March 8, 1943, at the opening of court on that day, or as soon thereafter as counsel can be heard, for the following relief:

1. That all papers, records, documents and files, and all other property seized by the Government from the apartments of Edward F. Zap, numbers 6 and 12, at 10976 [24] Wilshire Boulevard, West Los Angeles, California, be returned to the petitioner;

2. That all papers, records, documents and files, and all other property seized by the Government from the offices of Edward F. Zap Aeronautical Engineers, without a search warrant, be returned to the petitioner;

3. That any and all of the aforesaid property so seized be suppressed and that the United States

Attorney be restrained from using any of the documents or other papers aforesaid upon the trial of this action, or any information directly or indirectly obtained therefrom;

4. That all of said property aforesaid so unlawfully seized be returned to the petitioner;

5. For such other and further relief as to the Court may seem just and proper.

Dated: March 4, 1943.

MORRIS LAVINE
Attorney for Petitioner
Edward F. Zap

Received copy of the within this 5th day of March, 1943.

JAMES E. HARRINGTON
Attorney for Plaintiff

[Endorsed]: Filed March 5, 1943. [25]

[Title of District Court and Cause.]

MOTION TO SUPPRESS AND RETURN EVIDENCE ILLEGALLY SEIZED AND IN VIOLATION OF THE U. S. CONSTITUTION

Comes now Edward F. Zap, the defendant herein, residing at 10976 Wilshire Boulevard, West Los Angeles, California, and with places of business at 1005 Broxton Avenue and 1795 Westwood Boulevard, West Los Angeles, California, and states and alleges as follows:

I.

That defendant was accused by Indictment 15728 in the District Court of the United States, in and for the Southern District of California, Central Division, of violation of certain untitled sections of the Federal Code, and by Indictment 15729 in said court of violation of Title 18, Section 19, U.S.C.A., said indictments being filed November 25, 1942.

That defendant reserved the time for filing the plea of not guilty, and the Government and the defendant stipulated that same may be filed on the date set for trial.

II.

That during the month of October, 1942, defendant was [26] residing at the Westshire Apartments, 10976 Wilshire Boulevard, West Los Angeles, California, apartments 6 and 12, and that during the month of October he and his wife were out of the city; that he is informed and believes, and upon such information and belief alleges that while he was away agents of the Federal Bureau of Investigation came to the aforesaid two apartments where defendant and his wife were living, and at that time and place these agents searched the apartments of defendant, to-wit, apartments 6 and 12 at 10976 Wilshire Boulevard, West Los Angeles, California, without a search warrant; that they accosted the manager of said apartment house and said manager asked the agents if they had a search warrant; that one of the agents replied that they did not, but that it was not necessary, that it was government busi-

ness; that thereafter said agents for the Federal Bureau of Investigation, and another agent who had come with them, without any warrant, searched the apartments; they went through the desk in the living room, the closet in the bedroom and a chest of drawers, and the hall closet; they looked in the large clothes closet in the living room and found some boxes on the floor which they went through; in one of those boxes affiant is informed and believes, and upon such information and belief alleges, they found some checks which they said was what they were looking for; they then took the checks out and told the apartment house manager they were going to have them photostated and would have them [27] back the next day; that they brought the checks back the next day.

That they did not at any time have a search warrant on these visits, and all they told the said manager of the apartment house was that it was Federal business and not to tell anybody.

The agent who took certain checks left slips of paper exactly where he returned the checks.

That the following Saturday these two men came back, with another man, and brought a search warrant, and removed the checks and papers which had been taken and photostated before. That said second search was based on information gained at the first and illegal search, and was therefore void.

III.

That the said search warrant which the Federal officers had was in itself void for the reason that

it was based upon information and belief of Harry Champlin and not upon any probable cause; that the affidavit in support of the said search warrant was in itself insufficient in that it was based upon hearsay, information and belief, and upon conclusions of Harry Champlin, and did not specify the thing or things sought to be seized with any particularity.

IV.

That certain papers, records, documents and files, located at the office of Edward F. Zap at 1005 Broxton Avenue, [28] West Los Angeles, California, were also removed without a search warrant or any legal authority, and said search and seizure of said office was unlawful under the Fourth and Fifth Amendments to the Constitution of the United States.

V.

That the said checks and check stubs so seized without a search warrant from 10976 Wilshire Boulevard, West Los Angeles, and the papers, records, documents and files so seized from 1005 Broxton Avenue, West Los Angeles, were illegally seized.

VI.

That the said subsequent search warrants, based on information gathered in the illegal search and seizure and photostating of said documents were and are illegal.

VII.

That the said search warrants are further illegal in that they are too vague, indefinite and uncertain

in describing the property about to be seized, and the affidavit on which they are based is too vague, indefinite and uncertain.

VIII.

That the said agents had no legal or other authority to make the search and seizure in the first investigation upon which they later based their search warrants of October 31, 1941; that the said agents had no right to enter the premises at 10976 Wilshire Boulevard and 1005 Broxton Avenue, West Los Angeles, California, and take the said checks, [29] check stubs, papers, records, documents and files, and said seizure was and is in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and defendant asserts that his rights were invaded in said seizure of said personal papers and documents, and he prays for their return and that the evidence, if it is intended to be used against him, so obtained in violation of said Fourth and Fifth Amendments, and following an unlawful search and seizure, be suppressed, as his rights under said Fourth and Fifth Amendments have been greatly violated; and defendant respectfully prays for the following relief:

1. That all of such evidence be excluded upon the trial of this action, and that this Honorable Court now make its order of suppression;

2. That all of the property so unlawfully seized and photostated without a search warrant in the first instance, and based upon search warrants in the second instance which were subsequent to this

illegal search and seizure, be returned to this defendant; [30]

3. That all of the property so unlawfully seized from his said offices without a lawful search warrant be returned to him.

EDWARD F. ZAP
Petitioner

MORRIS LAVINE
Attorney for Petitioner

State of California,
County of Los Angeles—ss.

Edward F. Zap, being first duly sworn on oath deposes and says:

That he is the petitioner herein; that he has read and knows the contents of the foregoing petition and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

EDWARD F. ZAP

Subscribed and sworn to before me this 4th day of March, 1943.

ZOA L. ZACCHE
Notary Public in and for said County and State.

Received copy of the within this 5th day of March, 1943.

JAMES E. HARRINGTON
Attorney for Plaintiff

[Endorsed]: Filed March 5, 1943. [31]

Points and Authorities

Garske v. United States, 1 Fed.(2d) 620;
United States v. Mitchell, 274 Fed. 128;
Weeks v. United States, 232 U.S. 383;
Silverthorne Lumber Co. v. United States, 251 U.S. 385;
Boyd v. United States, 269 U.S. 20, 70 L.Ed. 145;
Agnello v. United States, 269 U.S. 20, 70 L.Ed. 145;
Byars v. United States, 273 U.S. 28, 71 L.Ed. 520. [32]

[Title of District Court and Cause.]

NOTICE OF MOTION

To Special Assistant to the Attorney General, James E. Harrington, Special Attorneys Walter S. Binns and George R. Maury:

Please take notice that on Monday, March 15, 1943, at the opening of court on that day, or as soon thereafter as counsel can be heard, the defendant, through his counsel, Morris Lavine, will move for an inspection of the minutes of the United States Grand Jury and for an inspection of all exhibits and records pertaining to the return of indictments Nos. 15728, 15729 and 15730, United States of America v. Edward F. Zap and Lloyd V. Scott, and for an order enabling the defendants to ascertain whether the said indictments were returned upon testimony secured by unlawful search and seizure in violation of the Fourth and Fifth

Amendments to the Constitution of the United States.

Said motion will be based upon all the records and files in the case and upon the affidavit of Edward F. Zap, and upon any testimony to be produced orally at said time and place.

Dated: March 9, 1943. [33]

MORRIS LAVINE
Attorney for Defendant
Edward F. Zap

Authorities

United States v. Farrington, 5 Fed. Rep. 343.

Received copy of the within Notice of Motion this 10th day of March, 1943.

JAMES E. HARRINGTON
Attorney for Government

[Endorsed]: Filed March 10, 1943. [34]

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS AND RETURN EVIDENCE ILLEGALLY SEIZED AND IN VIOLATION OF THE U. S. CONSTITUTION

State of California,
County of Los Angeles—ss.

Edward F. Zap, being first duly sworn, deposes and says:

That he is the defendant in the above-entitled

case; that he resides and did reside during the year 1942, and particularly during the months of October and November, 1942, at 10976 Wilshire Boulevard, Apartments 6 and 12, West Los Angeles, California, and that he maintained a business at 1005 Broxton Avenue, West Los Angeles, California:

That on the 18th day of October, 1942, affiant left the city of Los Angeles with his wife;

That affiant and his wife were the only two persons who reside or resided in said apartments 6 and 12 at 10976 Wilshire Boulevard, and that they were the only persons lawfully entitled to have in their possession any of the property or properties in said apartments; that when affiant and his wife left the said apartments on October 18, 1942, there [37] was then in said apartments personal check books, check stubs of checks that had been issued and also cancelled checks made out to L. V. Scott;

That affiant did not return to the City of Los Angeles until November 5, 1942; that when he returned the said cancelled checks and check stubs were gone from the said apartments; that affiant made inquiry regarding the said missing papers and documents from the manager of the apartment house, and that he was informed by said manager that during his absence from the city investigators from the Federal Bureau of Investigation had entered his said apartments without a search warrant or other lawful authority, and that these men, without displaying any search warrant and stating that such search warrant was unnecessary, took there-

from the checks made out by your affiant to L. V. Scott; that after taking the said checks without a search warrant the said government agents had the same photostated and returned them the next day;

That a week later the government agents returned to the said apartments with a search warrant and at that time removed the said checks and check stubs; that on his return to the city on November 5, 1942, affiant and his wife again occupied said apartments, and that these said checks and check stubs and cancelled checks were not then in said apartment; that neither affiant nor his wife took any of said articles from said apartments; that subsequently affiant saw said [38] articles in the office of the assistant to the Attorney General in the Federal Building at Temple and Main Streets in the City of Los Angeles, California, the said checks and check stubs which he saw there being the ones which had formerly been in his said apartments;

That at no time did affiant give anyone permission to enter or search his said apartments or take therefrom said checks and check stubs; that at no time was affiant served with any search warrant, and at no time did he give anyone permission or consent to the removal of any private documents, papers, checks or articles which were taken;

That affiant's said business at 1005 Broxton Avenue, West Los Angeles, was a personal enterprise, owned by affiant; that at no time did he authorize anyone to take any books, papers, records and documents from the said business; that when affiant left

the City of Los Angeles on October 18, 1942, several books, papers and documents were in his said place of business; that said books, papers and documents were removed without his knowledge or consent, and that he has since seen said books, papers and documents in the office of the assistant to the Attorney General on the 16th floor of the Federal Building, Los Angeles, California; that at no time did affiant consent to the taking of said books, papers and documents, and that at no time was he served with a search warrant, and that he did not know of the taking of these books, papers and documents at the time they were taken. [39]

EDWARD F. ZAP

Subscribed and sworn to before me this 10th day of March, 1943.

ZOA L. ZACCHE

Notary Public in and for said County and State.

[Endorsed]: Filed March, 1943. [40]

[Title of District Court and Cause.]

ORDER SHORTENING TIME

Good cause appearing therefor,

It Is Hereby Ordered that the time within which the motion for inspection of the Grand Jury minutes may be heard be shortened to March 15, 1943, at the hour of 10:00 A. M. or as soon thereafter as the Court can hear said motion.

It is understood that the notice of motion and

motion were served on the Government on Wednesday, March 10, 1943.

Dated: March 12, 1943.

LEON R. YANKWICH
District Court Judge

Received copy of the within Order Shortening Time this 12th day of March, 1943.

JAMES E. HARRINGTON
Attorney for plaintiff [41]

[Endorsed]: Filed March 12, 1943.

[Title of District Court and Cause.]

STIPULATION

It is Hereby Stipulated by the attorneys for the United States of America and the defendant Edward F. Zap that the time within which the motion for inspection of the Grand Jury minutes may be heard may be shortened to March 15, 1943, at the hour of 10:00 A. M., or as soon thereafter as the Court can hear said motion.

Dated: March 12, 1943.

JAMES E. HARRINGTON
GEORGE R. MAURY
WALTER S. BINNS
Special Assistants to the Attorney General War Frauds Unit, Department of Justice

MORRIS LAVINE
Attorney for Defendant Edward F. Zap

[Endorsed]: Filed March 12, 1943. [42]

State of California,
County of Los Angeles—ss.

Zora Frye, being first duly sworn, deposes and says:

I was during the months of September, October, and November 1942 the manager of the Westshire Apartments at 10974, 10976 Wilshire Boulevard, West Los Angeles, California. Mr. and Mrs. Edward F. Zap occupied Apartments 6 and 12 at 10976 Wilshire Boulevard. During the month of October and November, commencing with on or about October 18, 1942, and covering a period until on or about November 5, 1942 Mr. and Mrs. Zap were away, having informed me previously that they were going to Washington, D. C.

During their absence an agent for the Federal Bureau of Investigation came to me and asked me if he could search Mr. Zap's apartment. I asked him at the time if he had a search warrant and he said it wasn't necessary for the F.B.I. There were two agents present. The one agent told me that it was secret government business and asked me to promise him that I wouldn't even tell my employers, the owners of the building, about it. I nevertheless called my employer who told me that if it was an F.B.I. agent to let him in. The agent came back with another agent and I stayed right there while they search around. They went through the desk in the living room, through all the closets, in a chest of drawers in the hall closet. There were

some boxes on the floor of the large closet. They looked through those and found some checks that they were looking for. They said they were taking the checks to make photostatic copies and they would have them back the next day. The next day they brought the checks back and put them into the boxes where they had taken them out. On a following Saturday one of the two men came back and brought another agent named Mr. Myerson with him, and a third. This time they brought a search warrant. This time the men showed me the search warrant and they went into the apartment and took the checks from the same places where they had left them before and have never brought them back to my knowledge.

ZORA FRYE

Subscribed and sworn to before me this 15th day of March, 1943.

EDMUND L. SMITH
U. S. Dist. Cl.
So. Dist of Cal
by THEODORE HOCKS
Deputy

[Endorsed]: Filed March 15, 1943.

[Title of District Court and Cause.]

AFFIDAVIT OF ZORA FRYE

State of California,
County of Los Angeles—ss.

Zora Frye, being first duly sworn, deposes and says:

That during the month of October, 1942, I was the manager of the Westshire Apartments at 10974 Wilshire Boulevard, West Los Angeles, County of Los Angeles, State of California; that the exact apartment in which Mr. Edward F. Zap resided with his wife therein was numbers 6 and 12, and known as 10974¼ Wilshire Boulevard, West Los Angeles, California, and that he and his wife occupied the said apartment as a home during the month of October, 1942, and for some time prior thereto and for some time subsequent thereto he and his wife alone resided therein as a home and that they used it for such purpose exclusively; that no one else resided therein during said time but Mrs. Zap and her husband, defendant herein;

That some time in October, 1942, about the middle of [43] the month, two men came to me at the manager's office of said apartment house, and stated that they wanted to go to the Zaps' apartment, numbers 6 and 12, 10974¼ Wilshire Boulevard, West Los Angeles; that these two men then and there stated to me that they were investigators for the F.B.I.; that one of the men produced a Government identification card which had his picture on it; that I examined the picture and the identification and

compared the picture with the man and the name on the card, and it was that man's picture and the name he gave me; I do not, however, remember his name; that the man with the identification card stated that they wanted to search Mr. Zap's (the defendant's) apartment; that I then asked the two men if they had a search warrant and they stated that they did not but that it was not necessary for the F.B.I. to have a search warrant; that I then communicated with my employer, who told me to let the F.B.I. men in; that these men asked me to promise them that I would not talk to anyone about their visit;

That acting on the said representations of these two men that they were Government agents, I then and there admitted them to Mr. Zap's apartment; they searched the desk in the living room and then searched the bedroom and the clothes closet there; they also looked in the chest of drawers, as well as in the closet; they searched Mrs. Zap's dressing room and also searched the kitchen; they then went back into the living room; there is a big closet there where the [44] bed has been taken out to make more room; there were some boxes on the floor of this closet and they searched through these boxes until they found some checks in one of the boxes; one of these Government men then said to the other that this was what they were looking for; this man had slips of paper that he wrote on and marked the places where he then took checks out; this Govern-

ment man then said to me that they were taking the checks to make photostatic copies of them and that they would have them back the next day; the next day these two Government agents returned and brought the checks back and put them in the identical place in the closet where they had abstracted them the day before;

That Mr. and Mrs. Zap were not at home at this time, and that they had left several days before, stating to me that they would be out of the city and were going to Washington, D. C.

That these two Government agents told me they couldn't tell me what they were looking for as it was Federal business; that it was a Federal investigation, and that on account of war conditions that made it more serious, and therefore they requested me to keep the matter most confidential and not to tell even my employers, who, at the time, were Mr. and Mrs. Harold Fendler, both attorneys at law in Los Angeles, California;

That I then and there accompanied the two Government agents back to the apartment of Mr. and Mrs. Zap and they [45] put the checks back in the box from which they had removed them; that when they left they left the slips of paper in the places where the checks had been abstracted by them, as aforesaid;

I again saw one of these Government agents on the last day of October, 1942, at said apartment building; it was the one who had shown me his picture and Government credentials before; he brought

with him a Mr. Murray B. Myerson and another man, whose name I do not remember; he introduced Mr. Myerson to me and said, "Mr. Myerson is another Government agent." The man who introduced me stated that Mr. Myerson and the other man were with the F.B.I. in the Department of Justice; he at that time stated that he himself was attached to the Naval Intelligence branch of the Government; I asked him if that wasn't all the F.B.I. and he said it was just another branch of the Government;

He then stated to me that Mr. Myerson and the other agent had now come out with a search warrant and that they wanted to go to the place where he had returned the checks which had been so previously abstracted and photographed and returned; I had a colored man cleaning in the Zaps' apartment at the time, so I asked the Government agents to wait until I got him out of the Zap apartment residence, and as soon as I did so I took these Government men into the Zaps' apartment and Mr. Myerson and the other agent then signed the search warrant and took the said Zap checks from the places where [46] they had been returned, as pointed out by the first Government agent, who showed them where the checks were; that the first Government agent then and there told me that the other two men were signing the search warrant as he was all through with it and it was going to be in Mr. Myerson's hands from then on, that they were all Government agents and working together, and that the

search warrant which Mr. Myerson had then just left would be all that he would need;

That Mr. Myerson and this first agent and the other man questioned me, the first man doing most of the talking at this time; he asked me what kind of tenants the Zaps were, and I replied that they were the best tenants in the building, honest and responsible and liked by everyone around there, and that they were law abiding and had a very good reputation and always paid their bills.

ZORA FRYE

Subscribed and sworn to before me this 17th day of March, 1943.

ZOA L. ZACCHE
Notary Public in and for said County and State.

Received copy of the within this 18th day of March, 1943.

JAMES E. HARRINGTON
Attorney for Plaintiff. [47]

[Endorsed]: Filed March 19, 1943.

[Title of District Court and Cause.]

AFFIDAVIT OF EDWARD F. ZAP

State of California,
County of Los Angeles—ss.

Edward F. Zap, being first duly sworn, deposes and says:

That he is the defendant in the above-entitled case; that he was arrested on the 5th day of November, 1942, and was in jail on that date, and again on November 25th and until December 7, 1942;

That the Edward F. Zap Aeronautical Engineers was an individually owned concern operating as an experimental agency for and on behalf of the United States Navy, and that affiant was conducting important and confidential research relating to airplane flights adaptable to the Navy fighting planes; that by reason of the nature of his employment and the confidential relationship which existed between him and the United States Navy, books, papers, records, documents, ledgers, job cost sheets, cash books and journal, payroll ledgers and accounts, and other matters, were kept in a [48] large safe in the offices of said concern; that these books, papers and records contained also a large number of reports of statistical data regarding experiments for and on behalf of the United States Navy, and comprised correspondence and records of several years; that the experimental data filled several boxes, and that in all, the files and records of the Edward F. Zap Aeronautical Engineers, when packed, filled about eleven huge boxes; that the correspondence files, alone, were extremely bulky, and that the ledger accounts comprised between eight or twelve large volumes;

That it was impossible for anyone to examine and learn the contents of these books and records with-

out several weeks examination; that affiant employed a bookkeeper and an accountant to keep these books and records, and that naval cost inspectors spent from three to six days a week inspecting the same as a part of their regular routine in order that they might know the contents thereof and send in the reports necessary regarding the same; that it was a physical impossibility, therefore, for anyone to observe and know the contents of the job cost ledger, cost fixed fee ledger, job cost sheets, general ledger and transfer sheets, cash books, check ledger and journal and other papers and documents without a lengthy and prolonged examination;

That after affiant was arrested and released from jail in November 5, 1942, he personally observed Murray B. Myerson and James S. Sloan daily making inspections and [49] examination of the contents of these books, records and documents during the month of November, 1942, except from November 25th to December 7th, 1942, when affiant was again in custody, and that they were making notes thereon; that at no time did said Myerson or Sloan have any search warrant with them or display any search warrant to affiant.

That on or about November 6, 1942, at about 10:00 o'clock in the morning, affiant called several of his employees, to-wit, Harold Dale, Marion Israel, Harold Hanley, Ethel Boyle, Victor Bertagna, George Bates, Eldridge Weaver and Woodrow Smith, and in the presence of each of them and in the presence of Murray B. Myerson and James S.

Sloan, protested against said Myerson and Sloan entering the safe of the Edward F. Zap Aeronautical Engineers, and stated to Murray B. Myerson and James S. Sloan, "It is not right for you to go in there and use Champlin, as he is the crook and is trying to smear me. He has already been fired and has no right to be in the office, and no one has any right to look at these papers as they are the confidential papers of Edward F. Zap Aeronautical Engineers and concern their contracts with the Navy."

That the said Murray B. Myerson and James S. Sloan did not at that time have any search warrant for the examination of the said books, papers, records, ledgers, ledger sheets, cost sheets, payroll accounts, journals and documents; that when affiant protested that no one had any right to [50] enter the safe and look at these confidential records and documents, said Myerson stated that he was going to examine them for himself to find out what facts he could, and said to affiant, "You had better go on home and have a scotch and soda and forget your troubles here." That said agents Myerson and Sloan continued to search and seize books and records and examine same.

That agents of the F.B.I. practically daily searched and inspected these papers, books and documents; that on various dates affiant heard Murray B. Myerson and James S. Sloan ask Ethel Boyle, the bookkeeper, to open the safe and get the cost ledger and other books therefrom, and affiant saw

Miss Boyle, in pursuance of these directions, open the safe for them and take the books and records which they had requested therefrom; that these acts took place in November, 1942, without any search warrant, and affiant heard the Navy auditors protesting against the inspection and examination of these books and records by anyone other than the Zap personnel or the Navy; that affiant heard Mr. Greenfield, an auditor for the Navy, ask Murray B. Myerson and James S. Sloan during the month of November, 1942, the exact day of which affiant does not recall, what authority they had to examine said books and records which were the confidential property of Edward F. Zap Aeronautical Engineers and which were required to be kept confidential for the Navy; that Mr. Greenfield refused to give Mr. Myerson the books and affiant [51] overheard Mr. Greenfield state that he had not seen a search warrant; that thereafter Mr. Greenfield concluded the conversation and continued to work on the books and he at that time refused to turn them over to Mr. Myerson, stating, "After I am through you may do everything you think you have a right to do." That Mr. Myerson then produced his F.B.I. identification and said, "I have a right to do this. I am a member of the F.B.I., and whatever I see fit to do, I account for myself."

That agents daily continued to search, seize and examine books, papers, documents and records, without any search warrant.

EDWARD F. ZAP

Subscribed and sworn to before me this 18th day of March, 1943. ZOA L. ZACCHE
Notary Public in and for said County and State

Received copy of the within this 18th day of March, 1943. JAMES E. HARRINGTON
Attorney for Plaintiff

[Endorsed]: Filed March 19, 1943. [52]

[Title of District Court and Cause.]

AFFIDAVIT OF ETHEL BOYLE

State of California,
County of Los Angeles—ss.

Ethel Boyle, being first duly sworn, deposes and says:

That she was employed at the Edward F. Zap Aeronautical Engineers and that she worked there as a bookkeeper and accountant during the months of October, November and December, 1942; that some time during the last part of October, and on or about October 31, 1942, Special Agents Murray B. Myerson and James S. Sloan, of the Federal Bureau of Investigation, came into the offices and plant of said firm at 1005 Broxton Avenue, West Los Angeles, California, and identified themselves first of all to the telephone operator as agents of the F.B.I.; that they did not show any search warrant at any time and did not state that they had any search warrant; that they commenced searching the premises and went into the back of the office and into Mr. Zap's private office; [53] that they returned

from that time on daily and spent considerable time each day in the said offices; that at no time on any of these daily visits did they ever, to affiant's knowledge, display or hold any search warrant;

That the Job Cost Ledgers were in the private safe of the Zap Aeronautical Engineers and could not be identified by being "seen and observed"; that the ledger marked "Job Cost Fixed Fee" was also in the said safe, and could not be identified without the safe being opened and a search being made; that the general ledger and transfer sheets, the combination cash book, check register and journal, the payroll ledger and transfer sheets were also in the said safe; that all the employees' time cards were in the private office of Mr. Zap, in a file drawer, and could not be observed by any officer or person; that the cancelled checks of Edward F. Zap Aeronautical Engineers were in the said safe, and the checks of Mr. Zap were in his personal desk—all of them out of observation of any person coming in there, without a search first being made; that all of the checks of Edward F. Zap Aeronautical Engineers and the checks of Edward F. Zap belonging to the firm were in the safe, and the personal check books of Mr. Zap were in his private desk; that all copies of vouchers submitted to the United States Navy and attached supporting documents were in a file next to the auditor, and that this file was closed and at night was locked; that the invoice received by Edward F. Zap from the [54] University of Washington for wind tunnel expense was in a file cabinet;

That affiant was in the office where these papers,

records and documents were handled and knew their whereabouts as a part of her regular duties in the said establishment;

That affiant observed Special Agents Murray B. Myerson and James S. Sloan return to the Zap Aeronautical Engineers at 1005 Broxton Avenue, West Los Angeles, practically every day from October 31, 1942, until long beyond December 2, 1942, and at no time did they ever display to her or show any search warrant, and that during each of these daily visits they made a search and inspection of various time cards, check stubs, vouchers and other papers and documents and made notes thereon; that they frequently asked affiant to get different books from the safe and examined same; that the safe was always locked and had to be opened, and the F.B.I. officers asked affiant to open the same each morning and whenever they wanted something out of it; this took place all through November, 1942.

That affiant knows the construction of the offices and the location of all of the records, papers, documents, ledger sheets, etc. as part of her regular duties at the said plant, and knows that it would have been physically impossible for anyone, merely by looking, to have "observed" the documents and know the contents, as follows: [55]

Job Cost Ledger—Fixed Fee
Job Cost Ledger
General Ledger, and transfer sheets
Combination cash book, check register and journal

Payroll ledger and transfer sheets

Invoice received from University of Washington, Seattle, Washington, dated Aug. 28, 1942

Two books of check stubs

Time cards for weeks ending Sept. 30, 1942 and Oct. 7, 1942

Vouchers and supporting papers relative to contract NXs-4105

Vouchers and supporting papers relative to contract 83142

Cancelled checks of E. F. Zap Aeronautical Engineers and E. F. Zap 9 pckgs. Mar. to Nov. 1942

That affiant personally during November, 1942, was requested to get these documents for Mr. Myerson and did so.

That the checks and check stubs of Edward F. Zap Aeronautical Engineers were in a special drawer, and that those of Mr. Zap were in his private desk, and that the special drawer containing these checks and check stubs did not contain the job cost ledgers or the ledgers regarding jobs with cost plus fees, nor any general ledger sheets nor combination cash books, cash ledger or cash journal, nor the payroll ledger or transfer sheets, nor any employees' time cards, nor any vouchers submitted to the Navy and attached supporting documents, nor any invoice received by Mr. Zap from the University of Washington, and these matters, to affiant's knowledge, could only be observed by a separate and different search and inspection.

That affiant, as the bookkeeper at said establishment, handled the job cost ledger and general ledger and transfer [56] sheets, cash book, cash journal and register and other records, and knows that it would take several days' inspection to learn the contents thereof; that she personally observed Murray B. Myerson, and James S. Sloan examining these documents and records over a period of several days during November, 1942, and making notes thereon; that James S. Sloan copied and made notes on work sheets from the books, and on one occasion he came to affiant and said he could not make his sheets balance and asked affiant if she had a balance and to compare his figures with hers; that he then showed affiant the figures he copied from these books; he at no time showed affiant a search warrant to examine or look at these books; they are the books taken on December 1, 1942.

That some time on or about November 5, 1942, which date affiant recalls was the date of Mr. Zap's arrest, Mr. Murray B. Myerson came to affiant and said he wanted to get a cancelled check for $4,000 which was made out to William H. McAvoy; that at that time he had no search warrant for the same and did not display any; that affiant showed him where the check was in the file and he asked for it and affiant gave it to him; affiant also opened up the safe daily from November 5th until December 4th or 5th, 1942, for Mr. Myerson and Mr. Sloan and they went into the safe and took such books and records as they wanted with them to another part of the building, and would bring them back later in

the day; [57] and then the next day they would again ask for the books and records and again take them to another part of the building, returning them to affiant later in the day to lock in the safe; that these books consisted of the general ledger and transfer sheets, the combination cash book, check-register and journal, payroll ledger and transfer sheets, employees' time cards, the checks and cancelled checks of Edward F. Zap Aeronautical Engineers, copies of vouchers submitted to the United States Navy and supporting documents, the invoice received by Mr. Zap from the University of Washington for wind tunnel expense, and other books, papers and documents.

That affiant is well acquainted with each and all of these books and records, having kept and filed same, and that an examination of same would require at least three weeks to have personal knowledge of their contents and subject-matter; that Agents Myerson and Sloan examined same continuously for from three to four weeks.

ETHYL BOYLE

Subscribed and sworn to before me this 18th day of March, 1943.

FRANCIS DIRGE

Notary Public in and for said County and State

Received copy of the within this 18th day of March, 1943.

JAMES E. HARRINGTON

Attorney for Plaintiff

[Endorsed]: Filed March 19, 1943. [58]

[Title of District Court and Cause.]

AFFIDAVIT OF ESTELLE ZAP

State of California,
County of Los Angeles—ss.

Estelle Zap, being first duly sworn, deposes and says:

That she is the wife of Edward F. Zap, the defendant in the above-entitled case; that she and her husband reside and did reside during the months of October, November and December, 1942, at 10974½ Wilshire Boulevard, apartment 6 and 12, West Los Angeles, California;

That affiant frequently went to the offices of the Edward F. Zap Aeronautical Engineers at 1005 Broxton Avenue, West Los Angeles, California, during the months of November and December, 1942, and particularly from the 5th day of November to December 1, 1942; that on practically every occasion when she went to the said offices she observed Murray B. Myerson and James S. Sloan, of the Federal Bureau of Investigation, in said offices, and that they were endeavoring to examine papers, files, records and documents; that [59] at no time did she observe either of these men with a search warrant, nor did they ever show her a search warrant for the purpose of making an examination of the same, or for making a search of them; or at all, that affiant personally watched the plant and stayed in it during the period when affiant's husband, Edward F. Zapp, was in jail on November 5th, and from November 25th to December 7, 1942;

That the Edward F. Zap Aeronautical Engineers, at all times herein mentioned, was an individually owned enterprise of her husband, Edward F. Zap; that there were also present in the said offices naval auditors and naval cost inspectors, whom she had seen on the premises before, and who were examining books and ledgers as their customary duty; that on occasions she heard altercations between Murray B. Myerson and the naval officers; that in the month of November she overheard Mr. Meyerson ask a naval inspector if he could inspect a book and cost ledger, and that the said naval inspector replied that he could not, that he, the inspector, would not permit Myerson to examine any of the books or ledgers, as they were confidential matters with the United States Navy and that he would permit no examination without further orders; that Mr. Myerson did not produce any search warrant or any legal authority for making any search or inspection, and that at no time during the month of November, 1942, did affiant see Mr. Myerson produce any search warrant for making any examination or inspection of the books, records, [60] documents, ledgers and papers in the said establishment; that nevertheless, Myerson returned each day, and subsequently, during the month of November, and without any search warrant, did examine books, records, documents, papers and ledger sheets in the absence of said naval officer.

That the books, records, ledger shets, financial statements and contracts were all kept in a large,

double-door safe of the Edward F. Zap Aeronautical Engineers, and that in order to examine the same it was necessary to enter this safe and take these various books down; that these books, ledgers, records and other papers filled a space in the safe about three feet long, two feet deep and two feet high, and two feet high, and also several smaller divisions inside the safe that were kept locked;

That the checks and check stubs of said establishment were in a special compartment drawer in said safe, and that they comprised several hundred checks and duplicate check statements; that anyone removing these checks and check stubs could not possibly observe or know the contents of the job cost ledgers, job cost fixed fee ledgers and transfer sheets, combination cash books, cash register and journal, payroll ledger and transfer sheets, employees' time cards, copies of vouchers submitted to the United States Navy, or invoice received by Edward F. Zap from the University of Washington, or any other books, papers and documents, all of which were kept in said safe, and that the type, character [61] and description of said documents could only be learned by reason of a thorough and detailed search and examination lasting over a period of days;

That affiant personally observed Murray B. Myerson and James S. Sloan in the premises of said establishment almost daily from November 5, 1942, making such examinations of said documents during the entire balance of the month of November, and

without any search warrant; that upon the personal knowledge of affiant, as above set forth, affiant believes, and therefore alleges that the affidavit of Murray B. Myerson, dated December 1, 1942, before David B. Head, U. S. Commissioner, Southern District of California, was not based on matters that he observed by reason of being on the said premises on October 31, 1942, in search of checks and check stubs pursuant to an affidavit and search warrant of that date, but was based upon his illegal and continuous illegal examination and search of the said books and documents during the month of November, 1942, which formed the basis of his affidavit of December 1, 1942; that had said affiant, Murray B. Myerson, been able to observe the said books and documents on October 31, 1942, he would have secured another search warrant on that date, or shortly thereafter.

ESTELLE ZAP

Subscribed and sworn to before me this 18th day of March, 1943.

ZOA L. ZACCHE
Notary Public in and for said County and State

[62]

Received copy of the within this 18th day of March, 1943.

JAMES E. HARRINGTON
Attorney for Plaintiff

[Endorsed]: Filed March 19, 1943.

[Title of District Court and Cause.]

AFFIDAVIT OF ESTELLE ZAP

State of California,
County of Los Angeles—ss.

Estelle Zap, being first duly sworn, deposes and says:

That she is the wife of Edward F. Zap, defendant herein; that she and her husband have resided alone and exclusively at 10974½ Wilshire Boulevard, West Los Angeles, County of Los Angeles, State of California for approximately two years, and that affiant has never lived at 10976 Wilshire Bouevard, West Los Angeles, California.

ESTELLE ZAP

Subscribed and sworn to before me this 19th day of March, 1943.

ZOA L. ZACCHE
Notary Public in and for said County and State

Received copy of the within affidavit this 19th day of March, 1943.

JAMES E. HARRINGTON
Attorney for Plaintiff

[Endorsed]: Filed March 19, 1943. [63]

[Title of District Court and Cause.]

AFFIDAVIT OF EDWARD F. ZAP

State of California,
County of Los Angeles—ss.

Edward F. Zap, being first duly sworn, deposes and says:

That heretofore affiant signed an affidavit denominated "Affidavit in Support of Motion to Suppress and Return Evidence Illegally Seized and in Violation of the U. S. Constitution," and which is on file herein, in which it is recited that affiant resided at 10976 Wilshire Boulevard, during October and November, 1942;

That the said statement was inserted in said affidavit by mistake on the part of affiant's attorney, who, so affiant is informed by said attorney, did not know the exact street number of affiant's address, and only knew the building that affiant lived in on Wilshire Boulevard at the time said attorney prepared said affidavit, but said attorney had before him a copy of the search warrant in which it is [64] recited that apartments 6 and 12 at 10976 Wilshire Boulevard, West Los Angeles, are occupied by affiant, and said attorney has informed affiant that he assumed that the premises authorized to be searched by said said search warrant was affiant's correct address and acted upon such assumption only, and thereby caused said affidavit to erroneously recite said street address as affiant's residence.

Affiant further avers that in making and signing said affidavit his attention was centered upon the averments therein pertaining to the illegal search and seizure of his property, and affiant failed to note and did not observe that it was erroneously stated in said affidavit that his residence was set forth as above stated, as 10976 Wilshire Boulevard, and that his failure to observe and to correct said error was because of inadvertence upon his part as

aforesaid, and not otherwise, and affiant avers that his correct residence address during the months of October and November, 1942, was 10974¼ Wilshire Boulevard, West Los Angeles, County of Los Angeles, State of California, apartments 6 and 12, and that affiant has never resided at 10976 Wilshire Boulevard, West Los Angeles, California, either during those months or at any other time.

EDWARD F. ZAP

Subscribed and sworn to before me this 19th day of March, 1943.

ZOA L. ZACCHE

Notary Public in and for said County and State

[65]

Received copy of the within affidavit this 19th day of March, 1943.

JAMES E. HARRINGTON

Attorney for Plaintiff

[Endorsed]: Filed March 19, 1943.

[Title of District Court and Cause.]

OFFER OF PROOF

Comes now the defendant herein, Edward F. Zap, and, if permitted to call Murray B. Myerson and James S. Sloan, who, during all times mentioned herein were agents for the Federal Bureau of Investigation attached to the Department of Justice, as witnesses in this proceeding and to examine them, offers to prove by the testimony of said Myerson and Sloan the following facts:

That by reason of the official position of the United States agents Myerson and Sloan it is impossible for defendant Edward F. Zap or his counsel to secure and use herein any affidavits from said Myerson and Sloan, and these facts can only be brought out in examination in open court;

That Murray B. Myerson did not state all of the facts in his affidavit of March 12, 1943, in support of the plaintiff's resistance to the motion to suppress and return evidence; that said Myerson's affidavit is limited solely [75] to the acts of the Federal Bureau of Investigation (Department of Justice) and omits other agents and agencies of the United States Government who acted in the matter; that said Myerson's testimony would prove that prior to October 31, 1942, he received information from other agents of the United States Government, although not necessarily attached to the Department of Justice, but who were an agent or agents of the United States Government assigned to Naval Intelligence; that they, said Government agents, without a search warrant, illegally and in violation of the Fourth and Fifth Amendments to the Constitution of the United States, searched the apartment residence of Edward F. Zap on or about October 20, 1942, and went through books, papers, records and documents and took therefrom, without a search warrant, the following:

Check of Edward F. Zap to L. Scott,
$100.00 dated 8/27/41
100.00 dated 10/30/41
100.00 dated 11/4/41

200.00 dated 1 2 42
100.00 dated 7 18 41
100.00 dated 2 3 42

That on or about said October 20th they illegally and without authority abstracted said checks from Mr. Zap's residence apartment during his absence and took them to a United States Government agency where said checks were photostated by a United States Government photostating machine. [76] and that said checks were returned the next day to the same place from which they had been abstracted by said Government agents; that thereafter said Government agents on October 31, 1942, took Murray B. Myerson and G. C. Earl to the apartment of Edward F. Zap and took from said apartment the checks, from the place where said Government agents had previously returned and placed them after having taken said checks without a search warrant, as aforesaid; that one of said United States Government agents introduced Murray B. Myerson to Zora Frye, the manager of said apartment building, and said that he, Myerson, was going to handle the case from then on; that said Myerson then took the said checks and has kept them since that date.

Defendant offers to prove by said Myerson that he, Myerson, knows who this Government agent is and that he is a United States Government agent, and of what department of the United States Government he is in office.

That said Myerson's testimony would also show that on October 31, 1942, at approximately 4:45

o'clock P. M., he, said Myerson, went to the office of Edward F. Zap Aeronautical Engineers at 1005 Broxton Avenue, West Los Angeles, California, and secured check stubs from a locked box and made a return thereafter as to having received checks and check stubs pursuant to a search warrant issued on October 31, 1942; that each week day thereafter and until December 1, 1942, said Myerson and said Sloan returned to the offices of said [77] establishment at 1005 Broxton Avenue and daily made search and seizure and investigation of the books, records and files of the Zap Aeronautical Engineers; that on November 5, 1942, illegally and without authority, and without a search warrant, said Myerson took a check for $4,000.00 made out in the name of William H. McAvoy; that each day thereafter he continued to return to the said plant and make search and seizure of books, documents, records and papers, without any search warrant, and that said Myerson and said Sloan continued to do so every week day until December 1, 1942; that the affidavit and warrant of December 1, 1942, are based entirely upon the said continuous and constant illegal search and seizure and upon the information thereby obtained, and upon no other information; that the said check for $4,000.00 was taken pursuant to said illegal search and seizure and that all of the other books, documents, papers and records which were taken pursuant to the search warrant of December 1, 1942, as shown by the records and files in this procedure, were taken as a result of said knowledge

gained by said Myerson during the constant illegal search and seizure made during the month of November, 1942;

That the said officers made a return in their search warrant of October 31, 1942, stating that they had completed the search under it; that all searches, seizures and investigations subsequent to October 31, 1942 and to December 1, 1942, were without any search warrant and were illegal; [78]

That said Myerson and said other officers did not learn of the whereabouts, contents or existence of the job cost ledgers, the ledger marked "Job Cost Fixed Fees," the general ledger and transfer sheets, the combination cash book, check register and journal, the payroll ledger and transfer sheets, the employees' time cards, the cancelled checks in the office of Edward F. Zap Aeronautical Engineers and the personal checks and the personal check book of Edward F. Zap, kept in said office, copies of vouchers submitted to the United States Navy and supporting documents, the invoice from the University of Washington for wind tunnel expense, or of either or any of said documents, or any others, kept in the office of said Edward F. Zap Aeronautical Engineers, at any time or upon any occasion when said officers or either of them, entered and searched the residence apartment of said Zap or offices of Edward F. Zap Aeronautical Engineers under authority of a search warrant.

MORRIS LAVINE
Attorney for Defendant
Edward F. Zap

Received copy of the within Offer of Proof this 20th day of March, 1943 at 11:55 a. m., without waiver of the right of the United States to object that said document is filed late, and later than any time allowed by the Court for filing documents, and without waiver of the right of the United States to object to the document and its contents on the ground that no Offer of Proof was made on Monday, March 15, 1943, at the time of the hearing on the defendant Zap's Motion to Suppress Evidence and for return thereof, and on [79] the ground that no arrangements were made prior to said hearing on said motion for the taking of oral evidence, either with the Government or with the Court, and without waiver of the right of the United States to object to the evidence therein described on the grounds of immateriality, irrelevancy, and surprise, in that now for the first time the defendant Zap purports to allege that some persons other than F.B.I. Agents made some entry into the premises of Edward F. Zap, et ux, used by them as their home, as stated, in and with reference to said Offer of Proof.

JAMES E. HARRINGTON
GEORGE R. MAURY
WALTER S. BINNS

By GEORGE R. MAURY
Attorneys for the United States of America

[Endorsed]: Filed March 20th, 1943.

[Title of District Court and Cause.]

RESISTANCE TO MOTION TO SUPPRESS AND RETURN EVIDENCE

The United States of America, plaintiff above named, by and through the Attorney General, and his duly authorized assistants, resists the motion of Edward F. Zap, a defendant above named, upon the following grounds:

(A) Alleged Search at Defendant's Residence, 10976 Wilshire Boulevard, West Los Angeles, California

I.

That at no time during the month of October, 1942, nor at any other time, did any agents of the Federal Bureau of Investigation (Department of Justice) come to the apartments where defendant and his wife were living without a search warrant; that is to say, that the Government denies specifically the allegations upon information and belief to the contrary as stated in said defendant's motion, page 1, lines 30 to 32, and page 2, lines 1 to 23 inclusive.

II.

On or about the 31st day of October, 1942, a search warrant was duly and regularly issued by the United States Commissioner at Los Angeles, California, in the Southern District of California, Central Division, commanding Murray B. Myerson, a Special Agent of the Federal Bureau of Investigation in Los Angeles, to search those certain premises described as Apartments 6 and 12 at 10976

Wilshire Boulevard, West Los Angeles, California. That said search warrant was issued upon the affidavit of one Harry Champlin and said Murray B. Myerson, particularly describing the place to be searched and the articles and documents to be searched for and seized. That true and correct copies of said affidavits and said search warrant are hereto annexed.

That said affidavit of Harry Champlin speaks for itself and is based upon admissions against interest made by the defendant Edward F. Zap, as therein shown, and is not made upon hearsay and conclusion.

(B) Alleged Searches at 1005 Broxton Avenue, West Los Angeles, California

I.

On or about the 31st day of October, 1942, there was duly and regularly issued by the United States Commissioner at Los Angeles, California, within the Southern District of California, Central Division, a search warrant commanding Murray B. Myerson, a Special Agent of the Federal Bureau of Investigation in Los Angeles, to search those certain premises described as 1005 Broxton Avenue, West Los Angeles, California. That said search warrant described the things to be searched and seized, if found; and the same was based upon the affidavits of Harry Champlin and Murray B. Myerson. That true and correct copies of said affidavits and of said search warrant are hereto annexed. That at no time during the month of October, 1942,

nor at any other time, has any agent of the Federal Bureau of Investigation searched said premises at 1005 Broxton Avenue, West Los Angeles, California, without a search warrant.

II.

On or about the 1st day of December, 1942, there was duly and regularly issued by the United States Commissioner at Los Angeles, California, within the Southern District of California, Central Division, a search warrant commanding Murray B. Myerson, a Special Agent of the Federal Bureau of Investigation in Los Angeles, to search those certain premises described as 1005 Broxton Avenue, West Los Angeles, California. That said search warrant described said premises and the articles to be searched for and seized, if found; and the same was based upon the affidavit of Murray B. Myerson. That true and correct copies of said affidavit and of said search warrant are hereto annexed. That at no time during December, 1942, nor at any other time, did agents of the Federal Bureau of Investigation search said premises at 1005 Broxton Avenue, Los Angeles, California, without a search warrant.

Wherefore, the United States of America prays that the motion of Edward F. Zap be denied.

JAMES F. HARRINGTON
Special Assistant to the Attorney General
GEORGE R. MAURY
Special Attorney
WALTER S. BINNS
Special Attorney

LEO V. SILVERSTEIN
United States Attorney for the
Southern District of California

[Endorsed]: Filed March 15, 1943.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF RESISTANCE TO MOTION TO SUPPRESS AND RETURN EVIDENCE

United States of America,
Southern District of California,
Central Division—ss.

Murray B. Myerson, being first duly sworn, deposes and says:

That he is and at all the times hereinafter mentioned has been a Special Agent of the Federal Bureau of Investigation, stationed at the Los Angeles office thereof within the Southern District of California, Central Division.

That heretofore and on or about the 31st day of October, 1942, he received a search warrant, duly and regularly issued by the United States Commissioner in and for said District, authorizing him to search those premises described as Apartments 6 and 12 at 10976 Wilshire Boulevard, West Los Angeles, California; that thereupon he did so, and made his return. That true and correct copies of the affidavits supporting said search warrant, said search warrant, and your affiant's return thereon are hereto attached. That your affiant states of his

official knowledge that no Special Agent of the Federal Bureau of Investigation, during October, 1942, nor at any other time, has searched said premisgs, without a search warrant.

That on or about the 31st day of October, 1942, and again and subsequently on or about the 1st day of December, 1942, there were duly and regularly issued two separate search warrants by the United States Commissioner in and for the said District, authorizing your affiant to search those premises known as 1005 Broxton Avenue, West Los Angeles, California. That on each occasion, under the authority thereof, your affiant did so search said premises, and made his return. That true and correct copies of said search warrants, the affidavits upon which they were issued, and your affiant's return thereon are hereto attached.

That your affiant states that of his official knowledge no Special Agent of the Federal Bureau of Investigation has at any time searched those premises known as 1005 Broxton Avenue, West Los Angeles, California, without a search warrant.

That with reference to the foregoing, your affiant states that those premises known as Apartments 6 and 12 at 10976 Wilshire Boulevard, West Los Angeles, California, were, during the time hereinbefore mentioned, occupied as the residence of the defendant Edward F. Zap and his wife. That those premises at 1005 Broxton Avenue, West Los Angeles, California, were, during said times, utilized by said defendant Edward F. Zap in his then business, of doing aeronautical research work and en-

gineering experimental work and construction, largely under contracts with the United States Navy.

Further affiant sayeth not.

MURRAY B. MYERSON

Subscribed and sworn to before me this 12th day of March, 1943.

EDMUND L. SMITH
Clerk of U. S. District Court,
Southern District of California
By.....
Deputy

[Endorsed]: Filed March 15, 1943.

United States of America,
Southern District of California—ss.

SEARCH WARRANT
(Act of June 15, 1917, 18 United States Code 611 to 633)

The President of the United States of America:
To: Murray B. Myerson and James C. Sloane, Special Agents, Federal Bureau of Investigation, their aides and assistants, Greetings:

Whereas, Murray B. Myerson, a Special Agent of the Federal Bureau of Investigation, has this day made and presented before me, the undersigned United States Commissioner, an affidavit and application for search warrant, in which he deposes and says:

That, by reason of violations of 18 U.S.C.A. 80

and 83, a search warrant is desired covering the following described premises:

> The two ground floor rooms of the premises occupied by E. F. Zap Aeronautical Engineers and located at 1005 Broxton Avenue, Westwood Village, Los Angeles, California. Attached affidavit is made a part of this search warrant.

And Whereas, by reason of said facts, said applicant for search warrant says that at the above described premises there is now possessed and kept two Job Cost ledgers, one identified with the words job cost-fixed fee, the other with job cost; the general ledger and transfer sheets; the combination cash book, check register and journal; the payroll ledger and transfer sheets, and all employees' time cards; all cancelled checks of E. F. Zap Aeronautical Engineers and of E. F. Zap; all check books of E. F. Zap Aeronautical Engineers and of E. F. Zap; all copies of vouchers submitted to United States Navy and attached supporting documents; invoice received by E. F. Zap from the University of Washington, Seattle, Washington, dated August 28, 1942, in the amount of $5,256.63 for wind tunnel expenses.

And Whereas, upon examination of said affiant under oath, I am satisfied from the above recited facts, and do hereby find that there is probable cause to believe that the said violations exist at the above described premises;

Now therefore, you are hereby commanded in the name and [98] authority of the President of the United States, within the time allowed by law, to

enter the said premises above described and with the necessary and proper assistance of persons by you authorized, acting in your presence, in the day or night time, then and there to search the said premises, including outbuilding, cellars, passageways, and rooms connected therewith, for the property, articles and things above described, which may be found to be located in and upon the premises above described or in any part thereof, and to seize and bring the same before me, leaving a receipt therefor with the persons in whose possession or custody they may be found, together with a copy of this warrant; and you are hereby commanded to make due execution of this warrant within ten days from the date hereof and forthwith to make due return to me, together with a written inventory of the property, articles and things seized by you by virtue of this warrant, verified by your affidavit before me.

Witness my hand and the Seal of my office this 1st day of December, 1942.

(s) DAVID B. HEAD
United States Commissioner
Southern District of California

[99]

Pursuant to the within search warrant, there were seized at the office of the Zap Aeronautical Engineers, 1005 Broxton Ave., Westwood Village, Los Angeles, Calif., the following:

1. Job Cost Ledger—Fixed Fee.
2. Job Cost Ledger.
3. General Ledger, and transfer sheets.

4. Combination cash book, check register and journal.
5. Payroll ledger and transfer sheets.
6. Invoice received from University of Washington, Seattle, Wash., dated Aug. 28, 1942.
7. Two books of check stubs.
8. Time cards for weeks ending Sept. 30, 1942, and Oct. 7, 1942.
9. Vouchers and supporting papers relative to contract NXs-4105.
10. Vouchers and supporting papers relative to contract 83142.
11. Cancelled checks of E. F. Zap Aeronautical Engineers and E. F. Zap 9 pckgs. Mar. to Nov., 1942.

11:00 A. M.
Dec. 2, 1942

MURRAY B. MYERSON.
JAMES S. SLOANE
Special Agents F.B.I.
Los Angeles, Calif.

Retd. Dec. 3, 1942. [100]

APPLICATION FOR SEARCH WARRANT AND AFFIDAVIT IN SUPPORT THEREOF

(Act of June 15, 1917, 18 United States Code 611 to 633)

United States of America,
Southern District of California—ss.

On this day, before me, the undersigned United States Commissioner for the Southern District of

California, personally appeared Murray B. Myerson, a Special Agent of the Federal Bureau of Investigation, who, being by me first duly sworn, deposes and says:

That this affidavit is made for the purpose of securing a warrant for the search of the premises known and described as follows:

The two ground floor rooms of the premises occupied by E. F. Zap Aeronautical Engineers and located at 1005 Broxton Avenue, Westwood Village, Los Angeles, California. That affiant was on the above premises by reason of a previous search warrant and observed the hereinafter described books and documents.

That, by reason of the above facts, affiant says that at the above described premises, there is now unlawfully possessed and kept the following described property, articles and things:

Two Job Cost ledgers, one identified with the words job cost-fixed fee, the other with job cost; the general ledger and transfer sheets; the combination cash books, check register and journal; the payroll ledger and transfer sheets, and all employees' time cards; all cancelled checks of E. F. Zap Aeronautical Engineers and of E. F. Zap; all check books of E. F. Zap Aeronautical Engineers and of E. F. Zap; all copies of vouchers submitted to United States Navy and attached supporting documents; invoice received by E. F. Zap from the University of Washington, Seattle, Washington, dated August 28,

1942, in the amount of $5,256.63 for wind tunnel expenses.

Wherefore, affiant prays that a warrant to enter the said premises and there search for and seize the aforesaid books, records, papers, checks and property, be issued.

(s) MURRAY B. MYERSON
Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me this 1st day of December, 1942.

(s) DAVID B. HEAD
United States Commissioner
Southern District of California

[Endorsed]: Filed March 15, 1943. [101]

APPLICATION FOR SEARCH WARRANT AND AFFIDAVIT IN SUPPORT THEREOF

(Act of June 15, 1917, 18 United States Code 611 to 633)

United States of America,
Southern District of California—ss.

On this day, before me, the undersigned United States Commissioner for the Southern District of California, personally appeared Murray Myerson, a Special Agent of the Federal Bureau of Investigation, who, being by me first duly sworn, deposes and says:

That the affidavit is made for the purpose of securing a warrant for the search of the premises known and described as follows:

Premises known as 1005 Broxton Avenue, West Los Angeles, California, being the office occupied by Edward F. Zap in an enterprise known as E. F. Zap Aeronautical Engineers.

That he has read the accompanying and supporting affidavit of Harry Champlin, and believes that the facts set forth therein are true.

That, by reason of the above facts, affiant says that at the above described premises, there is now unlawfully possessed and kept the following described property, articles and things: Checks and check stubs covering payments of money by Edward F. Zap to Lloyd V. Scott.

Wherefore, affiant prays that a warrant to enter the said premises and there search for and seize the aforesaid checks and checks stubs and property be issued.

MURRAY B. MYERSON
Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me this 31st day of October, 1942.

DAVID B. HEAD
United States Commissioner
Southern District of California

[Endorsed]: Filed March 15, 1943.

United States of America,
Southern District of California—ss.

SEARCH WARRANT
(Act of June 15, 1917, 18 United States Code 611 to 633)

The President of the United States of America;
To: Murray B. Myerson and G. C. Earl, Special Agents, Federal Bureau of Investigation, their aides and assistants, Greetings:

Whereas, Murray B. Myerson, a Special Agent of the Federal Bureau of Investigation, has this day made and presented before me, the undersigned United States Commissioner, an affidavit and application for search warrant, and the affidavit of Harry Champlin in support thereof,

That, by reason of violations in Title 18, U. S. Code, Sec. 91, a search warrant is desired covering the following described premises:

Premises known as 1005 Broxton Avenue, West Los Angeles, California, being the office occupied by Edward F. Zap in an enterprise known as E. F. Zap Aeronautical Engineers.

That the facts upon which this warrant is based are set forth in the attached affidavit of Harry Champlin.

And Whereas, by reason of said facts, said applicant for search warrant says that at the above described premises there is now possessed and kept, checks and check stubs.

And Whereas, upon examination of said affiant

under oath, I am satisfied from the above recited facts, and do hereby find that there is probable cause to believe that the said violations exist at the above described premises.

Now therefore, you are hereby commanded in the name and by the authority of the President of the United States, within the time allowed by law, to enter the said premises above described and with the necessary and proper assistance of persons by you authorized, acting in your presence, in the [92] day or night time, then and there to search the said premises, including outbuildings, cellars, passageways, and rooms connected therewith, for the property, articles and things above described, which may be found to be located in and upon the premises above described or in any part thereof, and to seize and bring the same before me, leaving a receipt therefor with the persons in whose possession or custody they may be found, together with a copy of this warrant; and you are hereby commanded to make due execution of this warrant within ten days from the date hereof and forthwith to make due return to me, together with a written inventory of the property, articles and things seized by you by virtue of this warrant, verified by your affidavit before me.

Witness my hand and the Seal of my office this 31 day of October, 1942.

DAVID B. HEAD
United States Commissioner
Southern District of California

[Seal]

[Endorsed]: Filed March 15, 1943. [93]

Pursuant to the within Search Warrant, which was served on E. W. Hanley, Production Engineer, E. F. Zap, Aeronautical Engineers at 3:45 P. M., Oct. 31, 1942, there were seized two (2) books of check stubs.

M. B. MYERSON
G. C. EARL

Endorsed]: Filed March 15, 1943.

APPLICATION FOR SEARCH WARRANT AND AFFIDAVIT IN SUPPORT THEREOF

(Act of June 15, 1917, 18 United States Code 611 to 633)

United States of America,
Southern District of California—ss.

On this day, before me, the undersigned United States Commissioner for the Southern District of California, personally appeared Murray Myerson, a Special Agent of the Federal Bureau of Investigation, who, being by me first duly sworn, deposes and says:

That this affidavit is made for the purpose of securing a warrant for the search of the premises known and described as follows:

Apartments 6 and 12 situated at 10976 Wilshire Boulevard, West Los Angeles, California; the aforesaid apartments comprising one unit of living quarters occupied by Edward F. Zap.

That he has read the accompanying and support-

ing affidavit of Harry Champlin, and believes that the facts set forth therein are true.

That, by reason of the above facts, affiant says that at the above described premises, there is now unlawfully possessed and kept the following described property, articles and things: Checks and check stubs covering payments of money by Edward F. Zap to Lloyd V. Scott.

Wherefore, affiant prays that a warrant to enter the said premises and there search for and seize the aforesaid checks and check stubs and property, be issued.

MURRAY B. MYERSON
Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me this 31st day of October, 1942.

DAVID B. HEAD
United States Commissioner
Southern District of California

[Endorsed]: Filed March 15, 1943.

United States of America,
Southern District of California—ss.

SEARCH WARRANT
(Act of June 15, 1917, 18 United States Code 611 to 633)

The President of the United States of America:

To: Murray B. Myerson and G. C. Earl, Special Agents, Federal Bureau of Investigation, their aides and assistants, Greetings:

Whereas, Murray B. Myerson, a Special Agent of the Federal Bureau of Investigation, has this day made and presented before me, the undersigned United States Commissioner, an affidavit and application for search warrant, and the affidavit of Harry Champlin in support thereof.

That, by reason of violations of Title 18, U.S. Code, Sec. 91, a search warrant is desired covering the following described premises:

Apartments 6 and 12 situated at 10976 Wilshire Boulevard, West Los Angeles, California;

the aforesaid apartments comprising one unit of living quarters occupied by Edward F. Zap.

That the facts upon which this warrant is based are set forth in the attached affidavit of Harry Champlin.

And Whereas, by reason of said facts, said applicant for search warrant says that at the above described premises there is now possessed and kept, checks and check stubs.

And Whereas, upon examination of said affiant under oath, I am satisfied from the above recited facts, and do hereby find that there is probable cause to believe that the said violations exist at the above described premises:

Now therefore, you are hereby commanded in the name and by the authority of the President of the United States, within the time allowed by law, to enter the said premises above described and with the necessary and proper assistance of persons by you authorized, acting in your presence, in the day or night time, then and there to search the said

premises, including outbuildings, cellars, passage-ways, and rooms connected therewith, for the property, articles and things above described or in any part thereof, and to seize and bring the same before me, leaving a receipt therefor with the persons in whose possession or custody they may be found, together with a copy of this warrant; and you are hereby commanded to make due execution of this warrant within ten days from the date hereof and forthwith to make due return to me, together with a written inventory of the property, articles and things seized by you by virtue of this warrant, verified by your affidavit before me.

Witness my hand and the Seal of my office this 31 day of October, 1942.

DAVID B. HEAD
United States Commissioner
[Seal] Southern District of California

Pursuant to the within search warrant, which was executed at the within address at 4:45 P. M. Oct. 31, 1942, there were seized the following:

One (1) book of check stubs,
Check of Edward F. Zap to L. Scott,
$100.00 dated 8/27/41
100.00 dated 10/30/41
100.00 dated 11/4/41
200.00 dated 1/2/42
100.00 dated 7/18/41
100.00 dated 2/3/42

M. B. MYERSON
G. C. EARL

SUPPORTING AFFIDAVIT

United States of America,
Southern District of California—ss.

Harry Champlin, being first duly sworn, deposes and says:

That he is the comptroller employed by Edward F. Zap in connection with the engineering enterprize conducted under the name and style of E. F. Zap Aeronautical Engineers;

That said Edward F. Zap has executory contracts with the United States Navy Department of a confidential nature pertaining to the design of airplanes and armament;

That said contracts provide for inspection by a resident inspector of naval aircraft and the United States Navy Department has assigned as said resident inspector one Lloyd V. Scott in such capacity, and Lloyd V. Scott has been continuously performing the function of resident inspector from November, 1941, down to and including the date of this affidavit;

That since January, 1942, your affiant has observed check stubs pertaining to the bank account of Edward F. Zap with the Bank of America National Trust and Savings Association, Westwood Branch, showing that periodically payments have been made by said Edward F. Zap to Lloyd V. Scott for [94] the purpose of influencing his decision and action in the matter of his official duties as resident inspector of naval aircraft, and in order to

obtain from the Government sums of money in excess of the profit allowed under said contracts:

That on or about March 9, 1942, your affiant saw a check drawn upon said bank account by Edward F. Zap in the amount of One Hundred Fifty Dollars which said check was intended for Lloyd V. Scott as a payment to influence his official action and decision, and said Edward F. Zap has so stated to your affiant the purpose of said check at some time subsequent to March 9, 1942, the exact date of which your affiant does not now recall;

That some time during the first week of June, 1942, said Edward F. Zap told your affiant that he was going to remove the checks and check stubs pertaining to the payments made to Lloyd V. Scott as it was not wise to have such evidence around the office, and that he would take said checks and check stubs to his home;

That two or three days later your affiant had occasion to notice that said checks had been taken away from the office although some of the check stubs were not removed, and your affiant states that the stubs not so removed are to be found at the office of Edward F. Zap at 1005 Broxton Avenue, West Los Angeles, California;

That at all times herein mentioned Edward F. Zap has resided at 10976 Wilshire Boulevard, Apartments 6 and 12, [95] West Los Angeles, California.

(signed) HARRY CHAMPLIN

Subscribed and sworn to before me this 31st day of October, 1942.

DAVID B. HEAD
United States Commissioner
Southern District of California

RKL-ADA [96]

Memorandum of Points and Authorities

A search warrant cannot be issued except upon a showing of facts which tend to establish probable cause.

Veeder v. United States (7 Cir. 1918) 252 F. 414;

Steele v. United States, 267 U.S. 505, 510, 45 S.Ct. 417, 419, 69 L.Ed. 761;

Dumbra v. United States, 268 U.S. 435, 438, 45 S.Ct. 546, 547, 69 L.Ed. 1032.

The members of the Federal Bureau of Investigation are empowered to serve warrants.

5 U.S.C.A. 300(a).

Where the evidence is obtained under a valid search warrant, albeit against the will of the accused, then the search is reasonable, and the evidence is admissible.

Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470.

Where a search is reasonable, it does not invade the rights of the accused.

United States v. Bell, et al., No. 15759, D.C., S.D., Cal.—Jan. 26, 1943.

[Title of District Court and Cause.]

SUPPLEMENTARY RESISTANCE TO MOTION TO SUPPRESS EVIDENCE AND RETURN DOCUMENTS OF EDWARD F. ZAP.

In addition to and supplementary to its previously filed Resistance to a motion of Edward F. Zap to suppress evidence and return documents, The Government, by and through its attorneys, files this Supplementary Resistance, together with the affidavits of Hilton Byars, George B. Maury, and respectfully states to the Court:

That the search warrant issued by the United States Commissioner on or about the 31st day of October, 1942, described the premises of Edward F. Zap as 10976 Wilshire Boulevard, West Los Angeles; that the Government is informed and believes that said premises constitute one apartment in [80] an apartment building, but that the Government feels that same may possibly have been an erroneous description of said premises within the spirit and letter of the Fourth and Fifth Amendments to the Constitution, therefore represents to the Court that solely upon such error, the Government is willing that an Order be entered suppressing the use of the documents obtained from the residence of Edward F. Zap on or about the 31st day of October, 1942, and listed upon the return of Murray B. Myerson, after serving said search warrant, and being the following:

One (1) book of check stubs

Check of Edward F. Zap to L. Scott,
$100.00 dated 8/27/41
100.00 dated 10/30/41
100.00 dated 11/ 4/41
200.00 dated 1/ 2/42
100.00 dated 7/18/41
100.00 dated 2/ 3/42

The Government resists the return of said checks to Edward F. Zap on the ground and for the reason that the Government desires to offer them in evidence in Criminal Action No. 15730 entitled "United States of America v. Lloyd V. Scott," in which said Lloyd V. Scott, the payee named upon the checks, is the sole defendant.

Resistance in this respect is based upon the Government's resistance to the motion of Lloyd V. Scott to be allowed to take advantage of the motion and rulings thereon of Edward [81] F. Zap herein and reference is made thereto.

Dated, Los Angeles, California, March 22, 1943.

Respectfully submitted,

JAMES E. HARRINGTON
Special Assistant to the
Attorney General
GEORGE R. MAURY
Special Attorney
WALTER S. BINNS
Special Attorney
SADIE B. ARBUTHNOT
Special Attorney

[Endorsed: Filed March 22, 1943 [82]

[Title of District Court and Cause.]

AFFIDAVIT OF HILTON BYARS

United States of America,
Southern District of California,
Central Division—ss.

Hilton Byars, being first duly sworn, deposes and says:

That he is and at all times herein mentioned has been a Senior Accountant, a civilian, and employed by the United States Navy in such capacity. That since on or about June 1, 1942, it has been among his duties to assist in the cost inspection and auditing of the books, records and accounts of Edward F. Zap Aeronautical Engineers, located at 1005 Broxton Avenue, West Los Angeles, California.

That said Edward F. Zap Aeronautical Engineers, at all [66] times herein mentioned, has been a solely owned concern, owned by Edward F. Zap, the defendant above named. That said Edward F. Zap was, during the period from June 1, 1942, to and including December 1, 1942, to the knowledge of this affiant, engaged in performing certain aeronautical research and experimental work for the United States Navy under two separate contracts with the United States Navy, wherein said Edward F. Zap was designated in each contract respectively as the contractor. That one of said contracts was designated by the United States Navy and by said Edward F. Zap as Contract NOs-83142, and the other of said contracts was by the United States

Navy and said Zap designated as Contract NXs-4105.

That among the provisions of said Contract NOs-83142 was and is the following clause and proviso:

> "The accounts and records of the contractor shall be open at all times to the Government and its representatives."

That said Contract NXs-4105 contained and does contain, among others, the following clause and proviso:

> "The contracting officer and his authorized representative shall at all reasonable times have access to all records and books of account pertaining to this contract."

That the contracting officer therein mentioned and designated was at the time of the execution of such contract [67] a duly authorized contracting officer in the Bureau of Supplies and Accounts of the United States Navy and entered into said contract for and on behalf of the United States of America; that the United States of America was and is a party to said Contract NXs-4105 and to said Contract NOs-83142.

That on or about the 20th of October, 1942, and for a period of approximately six or seven weeks thereafter, two agents of the Federal Bureau of Investigation were engaged in making an audit and an inspection of the books of account and records of said Edward F. Zap at said place of business, 1005 Broxton Avenue, West Los Angeles, California, un-

der the auspices of and by and with the authority of your affiant, and Lieutenant L. S. Minor, a Cost Inspector of and for the United States Navy, under whose jurisdiction the books and records of said Edward F. Zap had been placed for purposes of audit and inspection, and under and with the authority of said contracting officer and under and with the authority of the United States of America.

That said Special Agents of the Federal Bureau of Investigation so engaged in such audit and inspection were Special Agent Murray B. Myerson and Special Agent James C. Sloane, of the Federal Bureau of Investigation, Department of Justice, with offices at Los Angeles, and that such audit and inspection was made under and by virtue of the foregoing quoted clauses and provisos of said contracts.

That at no time during said period did said Special [68] Agents of the Federal Bureau of Investigation make a search of said premises except upon two occasions when they appeared there with search warrants issued by the United States Commissioner in and for said District, and then and there they seized certain specifically designated books and records. That at all times during said period from on or about October 20, 1942, to and including the 1st day of December, 1942, all said books of account and records of Edward F. Zap pertaining to and under said contracts were within the custody of the United States Navy, pursuant to said contracts and the terms and provisions thereof, and said United

States Navy refused and declined to permit any person whatsoever to remove any of said books of account and records, or either of them, without a warrant.

That at all of said times said books of account and records were available to said Edward F. Zap and to all of his employees, and that no audit or inspection thereof was made by or on behalf of the United States Navy except during ordinary business hours.

Further affiant sayeth naught.

HILTON BYARS

Subscribed and sworn to before me this 20th day of March, 1943.

EDMUND L. SMITH,
Clerk of U. S. District Court, Southern District of California.

By IRWIN HAMES
Deputy. [69]

[Endorsed]. Filed March 22, 1943.

[Title of District Court and Cause.]

AFFIDAVIT OF GEORGE R. MAURY

United States of America,
Southern District of California,
Central Division—ss:

George R. Maury, being first duly sworn, deposes and says, that he is one of the attorneys for the United States of America in the above entitled maf-

ter; that he has read the affidavits of Edward F. Zapp and of Estelle Zapp in the above entitled matter pertaining to the residence of the defendant Edward F. Zapp and the numbering thereof. That in order to determine the actual facts concerning the same, on Saturday, the 20th day of March, 1943, your affiant, together with a photographer, went to the one-nought-nine- [83] hundred block on Wilshire Boulevard, in West Los Angeles, and then and there found that all residence numbers from 10974 to and including 10978 are upon a single lot, and comprise a certain apartment building, and that the separate numerical designations, consecutively from 10974 to and including 10978, are the separate designations of the various apartments, or subdivisions of said building, all upon said lot as aforesaid.

That at said time and place, your affiant caused certain photographs of said building and premises to be taken. That in action No. 15728 said photographs are hereto annexed, marked Exhibits A, B, C, and D respectively. That in action No. 15729, said photographs are incorporated by reference hereto, and are offered in evidence in both of said actions.

That Exhibit A is a photograph designating and showing the major portion of the building which occupies the lot comprising numbers 10974 to and including 10978 Wilshire Boulevard, West Los Angeles, County of Los Angeles, State of California.

That Exhibit B is a closer view of the main entryway to said building and shows graphically the

numbering system employed by the proprietor of said apartment building.

That Exhibit C shows and illustrates the entryway to apartment No. 6 therein, one of the apartments occupied by the defendant Zap.

That the view contained in Exhibit D is directly around [84] the apparent corner shown in Exhibit C, and to the right thereof, and designates the mail box arrangement for Apartments numbered 6 and 12, those apartments which were, during the period involved in these actions, occupied by defendant Edward F. Zap. That while it is indistinct in the photograph, Exhibit D, upon the nameplate under the wording "Apt. 6," the typewritten wording therein indicates the same to be presently the residence of Edward F. Zap; that said nameplate is directly over the number thereof, which is $10974\frac{1}{2}$ —not $10974\frac{1}{4}$ as stated by Edward F. Zap and Estelle Zap in their affidavits.

That your affiant has read the other affidavits of Edward F. Zap, Estelle Zap, Zora Frye, and of Ethel Boyle, all filed since the hearing hereon, and has read the affidavit of Hilton Byars. That your affiant has likewise read the return of service of the search warrant of December 1, 1942, and is familiar with the books and records of Edward F. Zap Aeronautical Engineers therein designated.

That your affiant hereat describes in detail each of said books and records in order that the Court may observe that they are each and all in connection with the business of said Edward F. Zap and in no wise connected with his residential affairs.

(1) Job Cost Ledger—Fixed Fee: This is a book of account, kept by the defendant Edward F. Zap in the course of his business; and is approximately 12 inches by 12 inches [85] by 1 inch thick, stiff-backed, loose leaf, ordinary ledger, with various pages therein under various accounts; said accounts are numbered and said pages are numbered under such accounts. Said book, as your affiant is informed and believes and therefore alleges pertains to the expenses incurred by said Edward F. Zap in performing work under a contract with the United States Navy wherein the total amount to be received as compensation therefor by said Edward F. Zap was to have been a sum certain, regardless of cost.

(2) Job Cost Ledger: This book is in all respects similar to the foregoing Job Cost Ledger—Fixed Fee. The distinction between the two, as your affiant is informed and believes and therefore alleges, is that in this second Job Cost Ledger were kept in detail the accounts of expenses incurred by said Edward F. Zap in performing contracts with the United States Navy on a "cost-plus" basis, wherein and whereby the United States Navy was to have paid said Edward F. Zap his entire cost incurred in performing such contract, plus a fixed fee, or an amount certain, as the profit of said Edward F. Zap.

(3) General Ledger and Transfer Sheets: This book is a book approximately 15 inches in length by 12 inches in width and approximately 2½ inches thick, stiff-backed, and is in all respects an ordinary general ledger containing ledger sheets under the

following headings: General Ledger, Assets, Liabilities, Revenues, Expenses; the accounts therein [86] are indexed in the front, and numbered commencing with Account No. 1.

(4) Combination Cash Book, Check Register, and Journal: This book is the same size as the foregoing described General Ledger, and contains upon the outside thereof the name "E. F. Zap." It contains accounts therein in journal form under the following headings: Cash Received, Check Record, Invoice Record, Payroll Journal. The accounts therein contain records of account of cash received by dates, checks written, by amount of check, check number date written, payee, description of account, and distribution of the expense. The invoice record contains a record of invoices for goods purchased; likewise in columnar manner. The payroll account merely contains total amounts of payroll for various dates. The journal account is by dates, and contains lists of charges and credits of various accounts.

(5) Payroll Ledger and Transfer Sheets: This consists of one red leather covered book approximately 12 inches by 15 inches and approximately ¾ of an inch thick and containing payroll date, the names of employees, the daily time worked by each, the total time, the regular time, overtime charges, and other data pertaining to payroll, including the department or work in which each employee was employed. Transfer sheets indicate transfers, etc., of payroll figures.

(6) Invoice received from University of Wash-

ington, Seattle, Washington, dated August 28, 1942: This is a docu- [87] ment showing certain charges made by the University of Washington to Edward F. Zap for experimental work done in the aeronautical windtunnel at the University of Washington.

(7) Two books of check stubs: These books of check stubs are approximately 4½ inches by 9 inches and each one contains the stubs of approximately 300 checks; after comparison with the check record aforesaid of these check stubs, your affiant is informed and believes that said check stubs pertain to and reflect checks written and subsequently torn from said stubs and negotiated.

(8) Time cards for weeks ending September 30, 1942, and October 7, 1942: These are the time cards of employees kept in the regular course of business during the periods above mentioned.

(9) Vouchers and supporting papers relative to contract NXs-4105: These consist of a folder bound by a fastener at the top, containing carbon copies of vouchers and supporting papers which were presented by Edward F. Zap to the United States Navy for reimbursement under said contract.

(10) Vouchers and supporting papers relative to contract 83142: These are similar to those listed above but pertain to the other contract alleged in the indictment.

(11) Cancelled checks of Edward F. Zap Aeronautical Engineers and Edward F. Zap, 9 packages, March to November, 1942. These were and are cancelled checks returned by the banks upon which

drawn after payment to Edward F. Zap, and all [88] kept in the regular course of business.

Further affiant sayeth naught.

GEORGE R. MAURY

Subscribed and sworn to before me this 22nd day of March, 1943.

EDMUND L. SMITH,
Clerk of U. S. District Court, Southern District of California.

By IRWIN HAMES
Deputy.

[Endorsed]: Filed March 22, 1943. [89]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
Southern District of California,
Central Division—ss.

Mildred Jacobsohn, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of Los Angeles County, California; that her business address is 1602 United States Post Office & Courthouse, Los Angeles, California; that she is over the age of eighteen years, and not a party to the above entitled cause.

That on March 22, 1943, she deposited in the United States Mails in the Post Office at Temple and Spring Streets, [90] Los Angeles, California, in the above entitled cause, in a franked envelope, true

copies of the within Supplementary Resistance to Motion to Suppress Evidence and Return Documents of Edward F. Zap, and Affidavits of Hilton Byars and George R. Maury, said envelope being addressed to Morris Lavine, Esquire, attorney for defendant Edward F. Zap, 215 West 7th Street, Los Angeles, California, at which place there is delivery service by United States Mail from said Post Office.

MILDRED JACOBSOHN

Subscribed and sworn to before me this 22nd day of March, 1943.

EDMUND L. SMITH,
Clerk of U. S. District Court, Southern District of California.

By IRWIN HAMES
Deputy. [91]

[Title of District Court and Cause.]

ORDER TO APPEAR AND SHOW CAUSE

To Lieutenant Commander Smith of the United States Navy, and to the United States Attorney:

You and Each of You will please take notice that on the.....day of....., 194....., at the hour of.....M., you are ordered to appear in the United States District Court, in and for the Southern District of California, Central Division, in the courtroom of the Honorable Harry Hollzer, and then and there show cause why you should not forthwith return to Edward F. Zap all of the papers, documents, files, records and pink slip which were taken from

him by the United States Navy following the arrest of said Edward F. Zap, solely to protect public interests.

Dated: December , 1942.

.....

Judge Presiding [102]

[Title of District Court and Cause.]

MINUTE ORDER OF MARCH 24, 1943

The motions of the defendants Edward F. Zap and Lloyd V. Scott, heretofore argued and submitted, are now decided as follows:

(1) The motion of the defendant Zap to suppress the use of documents, filed on March 5, 1943, is granted as to him only as to the use of the documents described as

> "the documents obtained from the residence of Edward F. Zap on or about the 31st day of October, 1942, and list upon the return of Murray B. Myerson, after serving said search warrant, and being the following:
>
> One (1) book of check stubs
> Check of Edward F. Zap to L. Scott,
> $100.00 dated 8/27/41
> 100.00 dated 10/30/41
> 100.00 dated 11/ 4/41
> 200.00 dated 1/ 2/42
> 100.00 dated 7/18/41
> 100.00 dated 2/ 3/42"—

solely upon the ground that the search warrant issued by the United States Commissioner on or about October 31, 1942, insufficiently described the premises occupied by Edward F. Zap therein.

The motion to return the same is, however, denied.

The motion to suppress the use of the other papers, records, documents, and files contained in the same notice of motion of the defendant Zap is denied.

Exception to defendant Zap.

(2) The motion of the defendant Lloyd V. Scott to suppress the same evidence, filed on March 12, 1943, is denied.

Exception to defendant Scott.

(3) The motion of the Government to strike the plea in abatement of the defendant Zap, filed March 5, 1943 and the plea in abatement of the defendant Scott, filed March 12, 1943, is granted and said pleas in abatement, and each of them, are hereby denied.

Exceptions to defendants Zap and Scott.

(4) The "Offer of Proof" filed by the defendant Zap in the office of the Clerk of the Court on March 22, 1943, without leave of the Court and not made in open court, is hereby rejected and the said offer of proof is ordered stricken from the files.

Exception to the defendant Zap.

Dated this 24th day of March, 1943.

Counsel notified.

[Endorsed]: Filed March 24, 1943.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the annexed petition and affidavit of Edward F. Zap, and upon all the proceedings heretofore had herein,

It Is Ordered that the United States Attorney for the Southern District of California, Central Division, and Commander G. A. Smith and Ensign Minor of the United States Navy, show cause before this Court on the 4th day of January, 1943, at the United States District Court House in the Federal Building, Los Angeles, before the Hon. Leon Yankwich on the opening of Court on that day, or as soon thereafter as counsel can be heard, why an order should not be made ordering and directing that all the property taken and held for protective custody only by the said Commander G. A. Smith and Ensign Minor should not be forthwith returned to Edward F. Zap, and why Edward F. Zap should not have such other and further relief as to this Court may seem just and proper; and

It Is Further Ordered that service of a copy of this order, together with the accompanying petition and affidavit, if made upon the United States Attorney for the [103] Southern District of California, Central Division, and upon said Commander G. A. Smith and Ensign Minor, on or before the ..... day of December, 1942, shall be due and sufficient service.

Dated: December ....., 1942.

HARRY HOLLZER
United States District Judge

Received December 24, 1942.
U. S. Attorney, Los Angeles, California.

[Endorsed]: Filed December 24, 1942. [104]

[Title of District Court and Cause.]

OBJECTIONS TO OFFER OF PROOF.

The United States of America, by and through its attorneys, objects to the Offer of Proof herein served by the defendant Edward F. Zap upon the 20th day of March, 1943, at 11:55 a. m., upon the following grounds:

Said Offer of Proof was not made at the time of the hearing herein upon the motion of the defendant Zap to suppress and return evidence; no arrangements were made prior to said hearing on said motion for the taking of oral evidence, either with the Government or with the Court; the evidence offered therein is immaterial, irrelevant, in that it neither tends to prove or disprove any of the grounds [111] of the motion filed by the defendant Edward F. Zap, and upon which such hearing was had; on the grounds of surprise that five days after the hearing upon said motion, the defendant now offers to prove, that some persons other than Federal Bureau of Investigation agents made some entry into the residence of Edward F. Zap, contrary to their allegations in said motion, their grounds set

forth in said motion, and contrary to the affidavits of Edward F. Zap and Zora Frye.

Dated: Los Angeles, California, March 22, 1943.

Respectfully submitted,

JAMES E. HARRINGTON
Special Assistant to the Attorney General
GEORGE R. MAURY
Special Attorney
WALTER S. BINNS
Special Attorney
SADIE B. ARBUTHNOT
Special Attorney

[Endorsed]: Filed March 22, 1943. [112]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,
Southern District of California,
Central Division—ss.

Mildred Jacobsohn, being first duly sworn, deposes and says:

That she is a citizen of the United States and a resident of ~~Los Angeles~~ County, California; that her business address is 1602 United States Post Office & Courthouse, Los Angeles, California; that she is over the age of eighteen years, and not a party to the above entitled cause.

That on March 22, 1943, she deposited in the United States Mails in the Post Office at Temple and Spring Streets, Los Angeles, California, in the

above entitled cause, in a [113] franked envelope, true copies of the within Objections to Offer of Proof, said envelope being addressed to Morris Lavine, Esquire, 215 West 7th Street, Los Angeles, California, attorney for Edward F. Zap, at which place there is delivery service by United States Mail from said Post Office.

MILDRED JACOBSOHN

Subscribed and sworn to before me this 22nd day of March, 1943.

EDMUND L. SMITH,
Clerk of U. S. District Court, Southern District of California
By IRWIN HAMES
Deputy [114]

[Title of District Court and Cause.]

NOTICE TO PRODUCE

To the Special Assistant United States Attorneys in the War Frauds Unit, Department of Justice, United States Post Office and Court House, Los Angeles, California, Attorneys for United States of America in the above entitled cause:

Demand is hereby made upon you to produce at the trial of the defendants in this case the originals of all the documents, records, papers, mock-ups, models, wind tunnel reports, and claims which either are in your custody or in the custody of the United States of America. You are advised that should you

fail to produce the same, the defendants herein will offer [115] secondary evidence relating to the contents, descriptions and details of the same as they relate to

1. Contract No. EXs4105.

2. Contract No. 83142.

3. All correspondence between the Zap Aeronautical Corporation or Edward F. Zap and the Bureau of Aeronautics or the Bureau of Accounts and Supplies, United States Navy Department, relating to each of these contracts.

4. All correspondence between the Resident Inspector of Naval Aircraft at El Segundo and the Bureau of Aeronautics or the Bureau of Accounts and Supplies relating to each of these contracts.

5. All records, vouchers, accounts, books, correspondence, etc., seized from the business premises of the Zap Aeronautical Co. at 1005 Broxton, West Los Angeles.

6. All correspondence between Commander G. A. Smith, Inspector of Naval Aircraft, Santa Monica, with the Bureau of Aeronautics or the Bureau of Accounts and Supplies relating to the above named contracts.

7. All mock-ups, models, wind tunnel reports, airplane test reports, etc.

Respectfully submitted,

HARRY GRAHAM BALTER
Attorney for Defendant Lloyd V. Scott

MORRIS LAVINE
Attorney for Defendant Edward F. Zap

[116]

Received copy of the within Notice to Produce this 3rd day of April, 1943, without waiver of the right of the Government to object that said notice is not served at or within a reasonable time prior to the trial; without waiver of the right of the Government to object that in federal criminal procedure no such notice is contemplated; and without waiver of the right of the Government to object that the notice is not directed to the Government, or to the Attorney General of the United States, or to the Special Assistant to the Attorney General in charge of the prosecution of the above entitled action.

JAMES E. HARRINGTON
et al.,
By GEORGE R. MAURY
Attorneys for the United States of America

[Endorsed]: Filed April 3, 1943.

[Title of District Court and Cause.]

PLEA IN ABATEMENT

Comes now the defendant Edward F. Zap and pleads in abatement to the indictment herein returned that the Grand Jury which returned the indictment was composed entirely of men, and that no women were on the panel from which the said Grand Jury was selected, and that the said Grand Jury was not constituted in accordance with the provisions of Title 28, Section 411, United States Codes Annotated.

Wherefore, defendant prays that the case be dismissed and he be discharged from custody.

Dated: April 1, 1943.

MORRIS LAVINE
Attorney for Defendant
Edward F. Zap [117]

State of California,
County of Los Angeles—ss.

Morris Lavine, being first duly sworn, deposes and says:

That he is the attorney for Edward F. Zap; that the official minutes of the Court and Grand Jury show that the Grand Jury which returned the indictment was composed entirely of men and that no women were drawn or impaneled to constitute or sit on said Grand Jury; that affiant is an attorney duly admitted to practice in all the courts of the State of California, and that the practice and procedure in the State courts of California is to impanel women as well as men for the purpose of sitting on County Grand Juries and for the purpose of sitting in the trial of cases in court; that there are at present seven women and twelve men on the County Grand Jury; that women as well as men have sat on the County Grand Jury for several years past, and particularly during the time for impanelment of the Federal Grand Jury for this district at the time of the calling of this case;

That the official records of the Federal Court show that no women have been called or impaneled on

the Federal Grand Jury for several years; that the practice of impaneling jurors for the Federal Grand Jury did not and does not conform to the practice in the State courts of California in that only men are called or impaneled for the Federal Grand Jury.

[118]

MORRIS LAVINE

Subscribed and sworn to before me this 1st day of April, 1943.

ZOA L. ZACCHE

Notary Public in and for said County and State.

[Endorsed]: Filed April 6, 1943. [119]

[Title of District Court and Cause.]

OBJECTION OF EDWARD F. ZAP TO JURISDICTION OF THE COURT

Comes now the defendant Edward F. Zap and objects to the jurisdiction of the court to proceed on the ground that he has been deprived of due process of law in the proper preparation and presentation of his defense in this case, in that the Government has, without a search warrant or other lawful process, seized and kept all of defendant's documents, letters, files and records, consisting of from eleven to fourteen boxes, in size approximately six feet long, three feet high and four feet wide, and that he has not had ready and free access to the same, nor has he been able to consult with his attorney privately with reference to them.

That in order to properly prepare his defense it is necessary for this defendant to have these records, files and documents.

Wherefore, defendant Edward F. Zap objects to the proceeding and moves the court for the return of all the documents, records and files so taken, and for a continuance [120] of this case for a period of ten days during which time he may have the return of all his personal files and records and be given an opportunity to prepare his defense.

Dated: April 1, 1943.

MORRIS LAVINE
Attorney for Defendant
Edward F. Zap

(Adams v. United States, 63 Sup. Ct. Rep. 236).

[Endorsed]: Filed April 6, 1943. [121]

AFFIDAVIT OF EDWARD F. ZAP

State of California,
County of Los Angeles—ss.

Edward F. Zap, being first duly sworn, deposes and says:

That he is the defendant in the above-entitled case; that following his arrest several large boxes of papers, documents and files constituting affiant's personal property and correspondence between himself and the United States Navy, including affiant's personal copies of his contracts, letters, exhibits,

models, mockups, wind tunnel reports, photographs, and his complete filing system, were boxed up and removed by officers and agents of the United States Government to a bomb proof room in the Douglas Aircraft Corporation located at Santa Monica, California, a distance of about twelve miles from the Federal Building in the City of Los Angeles, and approximately the same distance from the office of his attorney, Morris Lavine; [122]

That Commander Smith of the United States Navy stated that these articles were being held solely in protective custody and would be released at any time upon an order of the court or the Navy Department;

That affiant, in company with his counsel has gone to see these articles, which are vital to his defense; that in order to see them it has been necessary to make arrangements at least one or two days in advance, and to go with a representative of both the Army and the Navy into this inclosure; that there are no chairs or other facilities in this room and no ventilation, and that the representatives of both the Army and the Navy remain present during the entire period of inspection; that it is utterly impossible to hold any private conversations or discussions because of the presence of these representatives of the Army and the Navy, and the said room is too small for them not to be within hearing of affiant and his counsel;

That Commander Smith indicated that if affiant would specify what files he wished arrangements

might be made to deliver the same to the office of affiant's counsel, but that affiant is informed and believes, and therefore alleges that Commander Smith has refused, on the advice of Government counsel who are prosecuting affiant, to allow affiant to take these personal files and letters which are necessary in his defense; that affiant is thereby being deprived of due process of law guaranteed by the Fifth Amendment to the Constitution [123] of the United States, in that he is being deprived of his opportunity to prepare adequately his defense in this case and of the right of private consultation with his counsel over records and files that are his personal property;

That on March 30, 1943, affiant went to this shelter at the Douglas Aircraft and endeavored to see some of the records and files of wind tunnel tests which are necessary in the proper defense of his case; that upon entering said shelter where these papers and files are kept, with a representative of both the Army and Navy affiant found that there were several very large boxes each weighing 360 lbs. surrounding the property of affiant, and it was impossible to get into his files by reason of that fact; that when affiant asked to have these boxes removed so that he could inspect his property, the weight of these boxes was too great for the attendants to handle and they stated that there were no other Army representatives available who were permitted to go into this area, and that no one was permitted in this area except by special permission of the

Army; that in view of these facts affiant has been unable to and cannot examine his property; that these papers, records and files are vital to his defense and a proper presentation thereof.

EDWARD F. ZAP

Subscribed and sworn to before me this 1st day of April, 1943.

ZOA L. ZACCHE

[Endorsed]: Filed April 6, 1943. [124]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant Edward F. Zap and moves for a new trial on the following grounds, to-wit:

I.

The verdict is contrary to the law.

II.

The verdict is contrary to the evidence.

III.

The proof does not conform to the pleadings.

IV.

The verdict was decided by lot, or *be* means other than a fair expression of opinion on the part of all the jurors.

V.

The Court misdirected the jury in matters of law and erred in decisions of questions of law arising during the course of the trial.

VI.

The prosecutor was guilty of prejudicial misconduct [125] during the trial of the case before the jury.

VII.

New evidence has been discovered material to the defendant which he could not produce at the trial.

VIII.

Evidence was admitted which was unlawfully seized, in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and which should have been suppressed.

IX.

The defendant was denied due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

X.

The Court erred in instructions given and refused.

Dated: April 21, 1943.

MORRIS LAVINE
Attorney for Defendant

Points and Authorities

A party can only be tried on the indictment as found by the Grand Jury, and especially upon all its language found in the charging part of the indictment.

Ex parte Bain, 121 U.S. 1, 30 L.Ed. 849;
United States v. Independent Meat & Poultry Market, 32 Fed. Supp. 317;

Gallagher v. United States, 144 Fed. 87, 88; [126]
United States v. Cruikshank, 92 U.S. 542, 557;
United States v. Simmons, 96 U.S. 362, 24 L.Ed. 820;
United States v. Carll, 105 U.S. 611, 26 L.Ed. 1135;
United States v. Britton, 107 U.S. 655, 669, 27 L.Ed. 520, 522, 525;
United States v. Northway, 120 U.S. 327, 332, 334, 30 L.Ed. 664, 665, 666;
Evans v. United States, 153 U.S. 584, 587, 588, 38 L.Ed. 830, 831, 832;
Stoddard v. Palmer, 3 B & C, 20 Pick. 536;
Goodell v. State, 22 Ohio St. 203;
United States v. Mills, 7 Pet. 138;
United States v. Cook, 17 Wall. 167;
Comm. v. Hart, 11 Cush. 130.

The defendant was entitled to an instruction on his theory of the defense in the case as to Section T.D. 5000.

A defendant in a criminal case is entitled to an instruction on the defendant's theory of the case.

People v. Rosen, 11 Cal.(2d) 147, 152.

Received copy of the within Motion for New Trial this 21st day of April, 1943.

JAMES E. HARRINGTON,
Attorney for Plaintiff

[Endorsed]: Filed April 23, 1943. [127]

[Title of District Court and Cause.]

MOTION IN ARREST OF JUDGMENT

Comes now the defendant Edward F. Zap, and moves in arrest of judgment as follows:

I

The indictment fails to state a public offense.

II.

Count I of the indictment is too vague, indefinite and uncertain as to the nature and cause of the accusation, and fails to descend to necessary particulars as to the alleged claim or claims.

III

Counts IV and V of the indictment fail to apprize the accused of the disbursing officer to whom it is alleged a claim was presented.

IV

Counts IV and V of the indictment fail to set out the claim which it is alleged was presented.

[128]

V

Counts IV and V of the indictment fail to inform the accused of the exact nature and cause of the accusation.

VI

The indictment is vague, uncertain and ambiguous in Counts I, IV and V.

VII

Counts IV and V of the indictment are for the identical offense and charge two different statements of the same offense.

VIII

There are errors on the face of the record in respect to failure to establish any offense.

Dated: April 21, 1943.

MORRIS LAVINE
Attorney for Defendant

Points and Authorities

Where an indictment alleges a written instrument it should be set forth in haec verba.

United States v. Cruikshank, 92 U.S. 542, 557

United States v. Simmons, 96 U.S. 362, 24 L.Ed. 820

United States v. Carll, 105 U.S. 611, 26 L.Ed. 1135

United States v. Britton, 107 U.S. 655, 669, 27 L.Ed. 520, 522, 525

United States v. Northway, 120 U.S. 327, 332, 334, 30 L.Ed. 664, 665, 666

Evans v. United States, 153 U.S. 584, 587, 588, 38 L.Ed. 830, 831, 832. [129]

Stoddard v. Palmer, 3 B&C, 20 Pick. 536

Goodell v. State, 22 Ohio St. 203

United States v. Mills, 7 Pet. 138

United States v. Cook, 17 Wall. 168

Comm. v. Hart, 11 Cush. 130

Received copy of the within Motion in Arrest of Judgment this 21st day of April, 1943.

JAMES E. HARRINGTON
Attorney for Plaintiff

[Endorsed]: Filed April 23, 1943. [130]

[Title of District Court and Cause.]

AFFIDAVIT OF EDWARD F. ZAP

State of California,
County of Los Angeles—ss.

Edward F. Zap, being first duly sworn on oath deposes and says:

That he is the defendant in the above-entitled case; that by reason of the fact that the documents and records in his case were not delivered to him until the second day of the trial and it was impossible for him to get other facts and data relating to the University of Washington wind tunnel tests as set out in other affidavits, he could not, with reasonable diligence, secure the following data and facts and present them to the Court heretofore:

That affiant was in the University of Washington wind tunnel December 1, 2, 3, 4 and 5, 1941, at which time he was given 41 hours of wind tunnel time at a cost of $512.50; that the University of Washington at that time furnished 940 hours of labor at a cost of $969.80 for computing, making up and [131] reporting wind tunnel tests and data;

That thereafter in February, 1942, affiant went to the University of Washington and testing days were

on February 24, 25, 26, 27 and 28, 1942; that the tunnel time at that time was 45 hours, reaching a total of $562.50; that the labor on that occasion was secured privately by affiant and paid for privately, instead of through the University of Washington; that the University records and files show 256 hours only as being charged against affiant at a cost of $273.63, when the actual amount expended by affiant because of the amount of labor put in, comparable to the labor put in on December 1, 2, 3, 4 and 5, 1941, was $1,035.00;

That on March 2, 3 and 4, 1942, affiant was at the University of Washington and his wind tunnel time was 27 hours at a total cost of $337.50; that the University charged affiant for 232 hours of labor, whereas affiant proportionately used the same amount of labor of his own as the University used on the testing dates of December 1, 2, 3, 4 and 5, 1941, and that his labor charge would have been $611.00, which difference was paid by affiant privately;

That affiant again went to the University of Washington on May 12, 13, 14, 15 and 16, 1942, and the tunnel time then occupied was 35 hours at a cost of $437.50; that in preparing these reports the labor charged by the University was 160.5 hours of student time, or a cost of $168.49, whereas affiant employed students privately and in proportion [132] to the labor performed the cost should have been $805.00;

That during July, 1942, affiant was at the wind tunnel on July 20, 21, 22, 23 and 24, and occupied

the wind tunnel 41 hours at a cost of $512.50; that the only amount expended for labor was 142.5 hours at a cost of $146.52, whereas the private labor in proportion to the work done was approximately $943.00;

That affiant has full and complete reports for all of this work and can establish that all of the above work was accomplished at a substantial saving to the United States of America; that all of these reports are now in the possession of the Government in a bombproof shelter at Douglas Aircraft; that actually, the amounts charged by the University of Washington totaled $817.04; that had the University done all of the work it would have cost the Government approximately $3,394.00; that the difference between $3,394.00 and $817.04 is $2,576.96; that affiant filed a claim with the Government for approximately only $1,950.00 for this work, which was a saving to the Government of approximately $626.96;

That as the University of Washington was operating it took about seven months time to get reports from the University, but that by affiant handling this work privately he was receiving reports and having them completed in from three to five weeks after finishing the work in the wind tunnel.

EDWARD F. ZAP

Subscribed and sworn to before me this 22*st* day of April, 1943.

THEODORE HOCKER
Notary public in and for said
County and State

[Endorsed]: Filed April 22, 1943. [133]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant:

Edward F. Zap, 10974¼ Wilshire Blvd., Los Angeles, California.

Name and address of appellant's attorney:

Morris Lavine, 620 Bartlett Building, Los Angeles, California.

Offenses:

Violation of Title 18, section 80, United States Codes Annotated.

Date of Judgment:

April 22, 1943.

Brief description of judgment and sentence:

Nine months in County Jail, on each count, concurrent, and $2,000 fine on each count, consecutive.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence above mentioned on the grounds set forth below.

Pursuant to Rule V, I hereby serve notice that I elect not to enter upon the service of the sentence pending appeal, and that the judgment and sentence be stayed pending appeal. [134]

Dated: April 27, 1943.

EDWARD F. ZAP
Appellant

MORRIS LAVINE
Attorney for Appellant

Grounds of Appeal:

1. The indictment is in violation of the Sixth Amendment to the Constitution of the United States, in failing to inform the accused of the nature and cause of the accusation.

2. The indictment violates due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

3. The indictment fails to state a public offense.

4. The District Court erred in refusing a bill of particulars.

5. The District Court erred in refusing to suppress evidence unlawfully searched and seized in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

6. The District Court erred in overruling the plea in abatement and motion to quash the indictment.

7. The defendant was denied due process of law guaranteed by the Fifth Amendment to the Constitution of the United States in the procedure and proceedings of the case. [135]

8. The District Court erred in refusing defendant permission to inspect the minutes of the grand jury.

9. The District Court erred in overruling the demurrer to the indictment; the indictment is vague, indefinite and uncertain.

10. The indictment also charges two offenses of the same character.

11. The defendant was placed in double jeopardy

on counts IV and V of the indictment, in violation of the Fifth Amendment to the Constitution of the United States.

12. The verdicts are contrary to the law and the evidence; the evidence shows the defendant to be innocent of each of the crimes of which he was convicted.

13. The District Court erred in the admission and exclusion of evidence; evidence illegally seized, in violation of the Fourth and Fifth Amendments to the Constitution of the United States was received in evidence.

14. The District Court erred in refusing the defendant permission, prior to and during the trial, to examine witnesses orally regarding violations of the Fourth and Fifth Amendments to the Constitution of the United States in securing evidence and in refusing to suppress the same as being violative of these amendments.

15. The District Court erred and violated the right of the defendant under the Fifth Amendment in refusing the defendant a continuance for the purpose of preparing for [136] trial after all of his evidence had been taken over by the Government, and in not giving the evidence to him until the second day of the trial.

16. The District Court erred in admitting a check for $4,000 in evidence, applicable to counts IV and V of the indictment, which was illegally seized and used in evidence.

17. The District Court erred in failing to direct the verdicts for this appellant.

18. The District Court erred in failing to hold that a case tried on the theory of a conspiracy did not acquit the defendant Zap equally with the defendant Scott.

19. The District Court erred in instructing the jury to disregard the defendant Scott during the course of the reading of the indictment to the jury. This was an unauthorized change in the language of the indictment and deprived the indictment of validity.

20. The District Court erred in admitting the books in evidence which had been unlawfully searched and seized.

21. The District Court erred in failing to instruct the jury as to the applicable law in the case.

22. The District Court erred in giving improper instructions in the case.

23. The District Court erred in failing to arrest the judgment.

24. The District Court erred in fining and sentencing the defendant on each of counts IV and V of the indictment. [137]

25. The District Court erred in the admission and exclusion of evidence throughout the trial of the case.

EDWARD F. ZAP
Appellant
MORRIS LAVINE
Attorney for Appellant

[Endorsed]: Filed April 26, 1943. [138]

Los Angeles, California, March 15, 1943,
2 o'clock P. M.

The Clerk: 15728, United States of America v. Edward F. Zap and Lloyd Scott.

Mr. Lavine: We are ready, your Honor.

The Court: You may proceed.

Mr. Lavine: At this time, if your Honor please, the defendant Edward Zap moves for the suppression of all of the evidence taken at Apartments 6 and 12, 10976 Wilshire Boulevard, West Los Angeles, California. The correct address is 10974½, Apartments 6 and 12, Wilshire Boulevard, West Los Angeles.

We move to suppress a purported search warrant and also for the suppression of the use of all the matters taken under said purported search warrant, on the ground that it was taken under an illegal search and seizure in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

The defendant Edward F. Zap also moves for the suppression of all of the evidence taken from 1005 Broxton Avenue, the Edward F. Zap Aeronautical Engineers, a personally owned concern, which was also taken under a purported search warrant, and another search warrant following that purported search warrant, based upon information secured during the first illegal search and seizure. [1*]

In connection with those matters there have been affidavits filed. I also have one witness that I want to put on.

*Page numbering appearing at foot of page of original certified Reporter's Transcript.

The Court: We do not allow witnesses at these hearings.

Mr. Lavine: I have an affidavit.

The Court: We do not allow witnesses to be presented except by prearrangement and no prearrangements were made to do it.

Mr. Lavine: Now, if your Honor please, it appears from the affidavit of Zora Frye, who was the manager of the Westshire Apartments where Mr. Zap was residing, that during the months of October and November she was the manager of those apartments and that Mr. Zap was residing at an apartment at 10974, Apartments 6 and 12. The number is actually 10974½. There seems to be some slight difference in the exact address but it was that apartment house.

That during the months of October and November Mr. Zap was gone from the city and an agent of the Federal Bureau of Investigation came to her and asked her if he could search Mr. Zap's apartment. She asked him at that time if he had a search warrant and he said it wasn't necessary. There were two agents present at that time. The one agent told her that it was secret government business and asked her to promise him that she wouldn't even tell her employer, the owner of the building, that he had been there. She nevertheless called her employers and they told her to admit the [2] FBI agent.

The agent then went through the entire apartment from beginning to end and then when he came to a closet they found some checks which they said were

the matters they were looking for and they took the checks saying that they were going to photostat them and bring them back the next day.

They did take the checks and they returned them the next day.

About a week later one of these two men came with Mr. Myerson and another agent and they went directly to where the checks were located and this time they brought a search warrant and displayed the search warrant, taking the checks and they have never returned them.

The affidavit of Mr. Zap is to the effect that these checks were in his apartment when he left for the east and when he came back they were gone and that he subsequently saw these checks in the office of the assistant special attorney general in this building, on the 16th floor, very recently.

The affidavit on which the purported search warrant was based was made out by a Harry Champlin.

It does not allege that there was any crime committed nor that there was any probable cause for any investigation; and the sum total of Mr. Champlin's affidavit is that some time in March of 1942 Mr. Champlin says that he was a comptroller employed by Edward F. Zap and there were certain [3] contracts between the Navy Department of a confidential nature.

He says that in January of 1942 he observed check stubs pertaining to the bank account of Edward F. Zap, showing periodical payments made by him to Lloyd V. Scott, for the purpose of in-

fluencing his decision and action in the matter of his official duties as resident inspector of naval aircraft, and in order to obtain from the Government sums of money in excess of the profit allowed under said contracts.

That on or about March 9, 1942, "Your affiant saw a check drawn upon said bank account by Edward F. Zap in the amount of $150."

Then he says: "During the first week of June, 1942, the said Edward F. Zap told your affiant that he was going to remove the checks and check stubs pertaining to the payments made to Lloyd V. Scott" to his home.

The affidavit was made out on October 31st, 1942.

There is nothing except the conclusions of Mr. Champlin and opinions as to the purpose and the effect and so forth of these checks, and the checks are not specified.

There is no specification in the affidavit as to what checks, what dates they were issued or any particularity at all.

There is no allegation in the affidavit as to any crime having been committed or that there was any probable cause.

The agent himself did not make any further affidavit [4] except one on the basis of Mr. Champlin's affidavit, and he merely states in his affidavit that he is making the affidavit for the purpose of securing a search warrant.

The affidavit of October 31 of Mr. Myerson is that he appears as a special agent, and that the affidavit

was made for the purpose of securing a search warrant for the search of the premises known as Apartments 6 and 12 at 10976 Wilshire Boulevard—"The aforesaid apartments comprising one unit of living quarters occupied by Edward F. Zap."

That he "has read the accompanying and supporting affidavit of Harry Champlin, and believes that the facts set forth therein are true."

He doesn't say for what purpose nor what crime is alleged to have been committed. He doesn't state what knowledge he has of any checks or what checks there are, the dates as between the date when Mr. Champlin is supposed to have conversed with Mr. Zap and the time when the affidavits were made here for the purpose of this search warrant. They are all mere conclusions and a matter of time here that doesn't lead to any reasonable or logical inference from which the court could gather even probable cause for this particular search.

Now, we have, first of all, the fact that a search was made by agents of the government, based upon Mrs. Frye's affidavit, prior to the time that even this search warrant [5] was made on Mr. Myerson's affidavit, based upon this indefinite and vague search warrant without any affidavit of probable cause.

Now, that touches the matter of the search of the apartment.

Now, with reference to the search of the offices of Mr. Zap we have this affidavit by Mr. Myerson himself, based upon his own search on December 1, 1942.

Mr. Myerson says that: "This affidavit is made

for the purpose of securing a warrant for the search of the premises known and described as follows:

"'The two ground floor rooms of the premises occupied by E. F. Zap Aeronautical Engineers and located at 1005 Broxton Avenue, Westwood Village, Los Angeles, California.' That affiant was on the above premises by reason of a previous search warrant and observed the hereinafter described books and documents."

Therefore, by his own admission the taking of the matters under that second warrant of December 1st, are based upon a previous search warrant which he based upon the affidavit of Mr. Champlin and which does not specify what checks or checks stubs or what crime or crimes were alleged to have been committed, and formed no reasonable or logical basis for the second and illegal search warrant.

That is the factual situation, your Honor.

Your Honor can take judicial notice and probably, or [6] at least it is a matter of common knowledge, that where a factory is concerned of the size of this concern, that a large number of checks occur in everyday course of business; that there are employees to be paid; a number of persons receive checks, a number are issued and an affidavit which merely says "Checks and check stubs" without describing any particularity is a fishing expedition which is forbidden by the Constitution.

Now, we have in the affidavit of Champlin mere conclusions and hearsay opinions of Mr. Champlin.

We have the prior search of the apartment by

agents of the FBI. It is true that Mr. Myerson has made an affidavit denying these searches, but he has admitted a second search based upon information gathered during the first search.

Now, the authorities in this matter are well known to your Honor. One of the leading authorities, which I didn't cite in my memorandum, but one which is no less an authority than your Honor himself in the Southern California Law Review under "Lawless Enforcement of the Law", and your Honor has gathered in that work and in other works a number of authorities on the subject of illegal search and seizure.

It has been constantly held by this court and by the Supreme Court of the United States, in the Weeks case, in the Boyd case, in the Agnello case and in a case which is very much like this case and which I did not cite in my authorities, but with which your Honor is no doubt familiar, [7] Gouled v. United States, 65 Law Ed. 647.

The proceedings had in this case are unlawful and the evidence should be suppressed and under the authority of Weeks v. The United States not only should be suppressed but should be returned to Mr. Zap and not permitted to be used in the trial.

The Court: I will hear from the other side. We will hear each motion separately.

Mr. Maury: So far as the validity of the affidavits supporting the search warrant are concerned, we submit them on what they say. There is no going back of that record and we submit that they are sufficient to show probable cause.

Probable cause need not allege necessarily that a crime has been committed, but if there is probable cause to believe there is one committed, and if that is a reasonable inference to be drawn then the requirements are met.

Counsel for the defendant, the moving party, seeks to confuse the court. First of all, I would like to call attention to a distinction. In the first place, in effect, counsel has made two motions, first as to an alleged search and seizure made at the residence of this man and the second as to a search and seizure made at the place of business.

He endeavors to draw out his theory to the effect or conclusion that all of these searches are based upon this original illegal, so-called illegal search warrant. [8]

We will argue the first motion first to this effect: in the residence—confining ourselves to that—we find in reading the affidavit that Mr. Myerson, who is mentioned by Mr. Frye, on the 31st of October received a search warrant duly and regularly issued. We know the Federal Bureau of Investigation is entitled to execute search warrants.

We are all too familiar with the rule. Whether it is right or wrong, it is the rule, that should some private person or some State officer or somebody else make an unlawful search and if that leads to a discovery by Federal officers or if the evidence thereby obtained is turned over to Federal officials, then the same may be used.

The Court: The Supreme Court last week decided two cases. I think it is the McDaniels and

another case and they affirmed the doctrine with this exception, that if those making the search had been identified to the police officers whose action was set in motion by the Federal officers, that they are then agents of the Federal government.

Mr. Lavine: May it please the court, in connection with the factual situation, if there is any question about the facts, we would ask leave for the court to take oral testimony. [9]

The Court: No, I am going on the affidavits. I will go by the affidavits. In other words, we have to determine whether there was any connection. The woman says an FBI man did that. I will have to determine whether that has any weight.

Furthermore, I have to presume that the duty was performed and the law provided specifically any agent of the government of the United States must, upon being asked, show his credentials, and I notice in the second part of the affidavit she states he gave his name as Myerson——

Mr. Lavine: I would ask leave to file a supplemental affidavit on that because I know the facts.

The Court: All right, if you want to file a supplemental affidavit go ahead. [10]

There is no rule that if somebody searches illegally, who is not connected with the FBI, and gives them the information afterwards and then they go and make a legal search, you can't tie the second one to the first one because the courts require that the fruits of the search are only illegal if the person who obtained them was acting as an agent—for in-

stance, in the old prohibition days or now, if an officer stops a man and finds alcohol in his car without a stamp and then turns him over to the FBI, they could use that regardless of the fact that the man did not have a search warrant, even though the cans of alcohol were not in sight and he didn't have a search warrant. In other words, the law insists that before the Government of the United States can be charged with the acts of others so as to invalidate a search, that there be a relationship between the two so that it can be said that they were acting for the Government of the United States. Unless it be shown that a person in the first search was a person acting as officer of the United States the two have to be considered separately.

Mr. Lavine: That is the reason, your Honor, that I have asked leave to take oral testimony and to have Mr. Myerson present and to have my witnesses present so that all the facts can be before the court, and so we may on proper cross examination of the government agents show the relationship.

[13]

The Court: I am never going to make again the mistake I made before in trying a law suit on search and seizure. You can go into all the details you want by affidavit and Myerson is known and you can get his picture and probably have the lady identify him, but we still have the positive denial he wasn't there and nobody under him was there.

Mr. Lavine: May it be understood, then, that I at this time move for leave to take oral testimony

of Zora Frye, Agent Myerson and Agent Earl and have your Honor make a ruling on it so I may note an exception.

The Court: Yes; the motion will be denied. However, an additional affidavit of Zora Frye may be filed. I will give you five days to file the affidavit and the government three days to answer.

Mr. Lavine: Exception.

The Court: I will make it three days because this case is set for trial for the 6th of April, and these matters should be disposed of before that time. I will give you three days to file the additional affidavit and government counsel two days to answer.

Mr. Lavine: May that be understood to mean that I may file any additional affidavits that may identify the agent?

The Court: Yes, any affidavits. I am not limiting you to any affidavits that bear upon the issue.

Mr. Lavine: On the question of two separate issues, your Honor, I think the government rather than the petition- [14] er is the one that is confusing the issue.

If I understand correctly the same affidavit of Harry Champlin, which is filed at the end of the government's opposition and dated October 31st, 1942, was used by Agent Myerson in behalf of both search warrants, for the search of the residence and the search of the business establishment.

The affidavit of Myerson as to the search sets forth—that is not the second affidavit—the first affidavit sets forth that he is basing it upon the infor-

mation furnished him by Mr. Champlin and there was only one affidavit of Mr. Champlin which was the basis for both of the searches.

In other words, it clearly appears from the affidavits of the government agents themselves that their search, both searches were apparently a fishing expedition based upon information which Champlin claims to have possessed in October as to matters that happened in March and June.

The Court: Information may be the basis of a search warrant—information from an outsider may be the basis of a search warrant regardless of how that man obtained information. There is no question that hearsay information is sufficient as grounds for reasonable search and the courts so held in matters like the internal revenue cases.

Mr. Lavine: May I ask your Honor's view on the question of the second search having been made on information gathered from the first search.

The Court: Well, I don't want to decide that until [15] I have the additional affidavits.

Mr. Lavine: That isn't the point—that is an uncontroverted fact established in Myerson's affidavit. He made a second affidavit based on information that he gathered when he was at the factory the first time. I am simply directing my remarks to that situation wherein he states that the "Affiant was on the above premises by reason of a previous search warrant and observed the hereinafter described books and documents," so he makes a second search based on his information gathered while he was making the first search.

The Court: Well, even if the first search were illegal that would not invalidate it, because the law does not say how you shall obtain the information.

Mr. Lavine: Assuming then that the first search was illegal and based on the first illegal affidavit, if your Honor holds that that was enough, then we have first the question whether he had a right to go back the second time based upon information he gathered during the first illegal search.

The Court: I will say this right now, assuming it was illegal, if he was on the premises and saw something there he could go back and on the basis of that secure an affidavit stating he believes that certain things are there. Now, let me hear the other motion.

Mr. Lavine: The other motion, your Honor, is a motion [16] to examine the minutes of the grand jury.

The Court: There is no such provision in Federal law.

Mr. Lavine: There is, your Honor.

The Court: Give me the section of the Code.

Mr. Lavine: There is a case, your Honor, in 5 Fed. It is at the bottom of the page.

The Court: That is something I never heard of.

Mr. Lavine: It is the practice in New York, I know.

The Court: It is not the law in district courts.

Mr. Lavine: No, it is a Circuit Court case.

The Court: I haven't run across that. That is something new to me.

Mr. Lavine: There is some law that is still good, your Honor.

The Court: It would have to be something very good before I would approve of that because federal grand juries are not subject to any inquisition on the part of anybody.

Mr. Lavine: The citation is 5 Fed. 343. There are some other cases but I haven't had time to run them down, your Honor.

The Court: I never ran across that. I say frankly it is something very novel.

Well, I wouldn't follow this case even as to the limited extent, because it doesn't conform to my ideas.

Unless you have some other authority, I am very well satisfied that I will not allow the inspection, especially [17] when it is made on the sole ground that you want to discover whether this testimony was used there. Of course, you will discover it was. Even if I held the search warrant was illegal and suppressed it, I wouldn't feel justified in suppressing the grand jury or its indictment.

Mr. Lavine: That is my point, the use of that evidence illegally obtained——

The Court: The Fourth Amendment doesn't apply. A grand jury is a presentment. The Fourth Amendment doesn't say you can't use illegal evidence before a grand jury.

Mr. Lavine: Do I understand that it is your Honor's ruling at this time that the Fourth Amendment doesn't apply?

The Court: No. I am merely saying that I will not grant, upon the showing you made, an inspection of the grand jury minutes, because that is not provided for in the law, and the Congress of the United States has so safeguarded the grand jury that I am not going to interfere with its prerogative by allowing somebody to inspect what went on there.

Mr. Lavine: Exception noted.

The Court: Then the motion to inspect the minutes of the grand jury will be denied, exception allowed. And the motion to suppress will be submitted while we wait for the additional affidavits.

Mr. Lavine: Very well.

Mr. Maury: The defense entered pleas in abatement [18] based largely on the grounds of the alleged illegality of the evidence sought to be suppressed, and the Government has filed a motion to strike, and a demurrer thereto.

The Court: If you want to submit it on the same facts and arguments, all right. I didn't remember. I kind of had an idea there were four.

Mr. Maury: Mr. Binns prepared the argument on that.

The Court: Do you want to argue anything in addition? I notice you covered it in your affidavit. So long as the matter is submitted, I will consider what you have there.

Mr. Lavine: We are willing to submit it on the additional affidavits.

The Court: The factual basis is the same as on the motion to suppress, isn't that correct?

Mr. Binns: Yes.

The Court: The additional question—we don't favor pleas in abatement. I only had one in the Ballard case, that is the one relating to the women on the grand jury, I think it was.

Mr. Maury: There is this additional point. A plea in abatement should not be made on information and belief.

The Court: Let it be submitted on the basis of the affidavits, and you get the affidavits in, and I will dispose of it in advance.

The Clerk: Both cases submitted on the same record?

Mr. Lavine: Yes. [19]

The Court: Any adverse ruling that I made to the defendants, an exception is allowed. [20]

Los Angeles, California, Tuesday, April 6, 1943.
10:00 A. M.

The Clerk: 15728 Criminal, United States against Lloyd Scott and Edward F. Zap, for jury trial.

Mr. Lavine: The defendant Zap is not ready, your Honor, for the reasons set forth in the affidavits which are herewith filed and submitted to your Honor, and I think perhaps if your Honor looks over those affidavits, we would like to argue the matter briefly at the bench.

The Court: With reference to the jury, gentlemen, an opinion was written a year or two ago by Judge Yankwich, which is a very well considered

opinion, and the court, of course, will deny the motion on that ground. All right. You may approach the bench now on this other matter.

(Whereupon the following proceedings were had at the bench.)

The Court: Are you familiar with that opinion of Judge Yankwich?

Mr. Lavine: Yes, I am familiar with it.

The Court: Some time it probably, of course, will go up and have the upper courts probably pass on it. Judge Yankwich gave it a great deal of consideration about a year ago and reviewed the Constitution and the statutes in the State of California, and reached the conclusion which I think is sound, and it was largely on that opinion that I based my ruling. I always want counsel to know on what grounds I [21] make these rulings. I will hear you on the other matter.

Mr. Lavine: Now, your Honor, the defendant Zap is in this position; that due to the barriers placed around him by the taking of the evidence and being placed in the bomb-proof shelter, in part, and some of it was taken by other agents of the Government, we have been in no position to meet the case of the Government at this time.

Last week I went with Mr. Zap, as the affidavit shows, to the bomb-proof shelter, and at the suggestion of Commander Smith, I segregated a number of papers and documents and things which we felt were necessary for the proper presentation of the defense. Both contracts which are in issue here are

in the personal files of Mr. Zap, and in that bomb-proof shelter the various letters, the extending agreements, and all of the various things that relate to this case are there. At all times during our presence in there a representative of the Government, both from the Army and the Navy, were present in the room, which is a very small room and affords no facilities for private consultation or for sitting down or making notes or for a careful and legal, proper study of these matters. Commander Smith stated, before we went over there on this occasion, that if I would segregate the articles we thought we needed, that he would then look them over and later in the day send them to my office. Later in the day he communicated with my office that it was impossible, that he couldn't let us have them. So we are in the position here [22] of having to defend a lawsuit in the absence of those vital papers which the Government itself has taken possession of and which we feel this jury has to have in order to present our case fully and adequately.

Commander Smith, in the earlier proceedings in this case, wrote a letter to Judge Hollzer, stating he would be willing to release those papers, he was only holding them in protective custody, but here we come to the time of the trial, and we felt confident that for this purpose we would have those papers and documents, but we don't have them and we have not had an opportunity to go over some of them which we feel is necessary in the adequate defense of this case.

Now, in the case of Adams vs. The United States, just decided by this term of court, page 87, Law Edition, page 212, Mr. Justice Frankfurter says: "Certain safeguards are essential to criminal justice. The accused must have ample opportunity to meet the case of the prosecution." And he goes on along other principles.

The Court: That has always been true. There is nothing new in that statement of the law. In other words, you cannot indict a man today and then tomorrow morning start the trial of his case without any opportunity for preparation. That has always been the law.

Mr. Lavine: We feel, therefore, that in order to have our case properly presented, we should have the return of those papers which are in the custody of Commander Smith, and [23] particularly those we have designated, which could be carried in possibly a suitcase or two. There are other things there which we will have to demonstrate to the jury and which are vital in our defense, such as models and "mock-ups" and things which the Government charges are involved in this case, and we can only present those adequately to the jury upon a demonstration that the work has been done pursuant to the contract. We are here required to defend ourselves against certain charges, and all our evidence is in the possession of our opponents, and we feel that we want to get this case presented in the fullest light of the truth, and we have to have those to present those matters in the fullest light of the truth.

The Court: All right. What has the Government got to say?

Mr. Maury: If the court please, there are two affidavits of Edward F. Zap filed, one pertaining to the books and documents alleged to be held in the custody of Commander Smith, of the United States Navy, the other pertaining to a certain witness, Harold Dale, who, it is said, was prevented by the Federal Bureau of Investigation, from communicating with Mr. Zap.

As to the second, to put the cart before the horse, I should like to have Mr. Murray B. Myerson, Special Agent of the Federal Bureau of Investigation, sworn and testify shortly as to any conversations that were held with Mr. Dale, [24] to show, first, that the Government did not tell Mr. Dale in anywise that he should not communicate with Mr. Zap, but merely explained to him his rights that if he felt like it he could, and if he did not want to it was his own option.

As to the first, which I previously named, that is books and records having been in custody of Commander Smith since November, 1942, the indictment was returned on the 25th day of November, 1942. Demurrers were interposed and argument on the demurrers was held on the 12th day of January, 1943. Likewise a plea in abatement was subsequently interposed, and various motions have been made before the court, including motions to suppress evidence, and I believe the last of those was disposed of; it was argued in the 15th of March and disposed of a week or eight days later.

Now, Section 636 of Title 28 of the United States Code Annotated, provides that the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue in cases under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery.

Such is the case. The defendant has had since November 25th to make such a motion to be permitted in the ordinary course to inspect these documents. He has come up, both by counsel and by his attorney, to our office and has been granted free inspection of any and all documents in our [25] possession; and so far as Commander Smith is concerned, from his own statement, it appears that he was granted free access to these and permitted to see them at the place where they were stored.

The Court: What connection has Commander Smith now got with the case?

Mr. Maury: Well, the connection, briefly, is this: that Mr. Zap was working on certain experimental aeronautical engineering work under contracts with the Navy specifically designated——

The Court: Yes, that is set forth in the indictment. I read that.

Mr. Maury: Set forth in the indictment. Under those contracts certain materials, certain tests, drawings, engineering data, and other documents were taken by the Navy, under claim of interest, the Navy being interested in those particular materials.

drawings and documents under those contracts; and they have been held by Commander Smith, who is the Inspector of Naval Aircraft for this particular area, ever since.

The Court: I didn't find his name in the indictment or any of the papers. I didn't know where he fit into this particular case.

Mr. Bimms: There was, your Honor, at one time, a motion to return certain evidence, wasn't there, served on Commander Smith? [26]

The Court: Yes, that is in the files.

Mr. Maury: I wish to interpose the further objection that counsel has not in anywise set forth in the affidavits of the defendant, Edward F. Zapp, how or in what manner these said documents or which documents are in anywise germane to the presentation of the case, and I should like to call attention to the Ninth Circuit case of Owyhee Land & Irrigation Co. vs. Tautphaus, 109 Fed. 547——

Mr. Lavine: That is a civil case.

Mr. Maury: ——in which it was stated: "That the remedy afforded by the statute can only be secured upon a proper application before the court, indicating the nature of the books or writings that are sought to be produced, and showing that the evidence sought to be obtained is material to the case of the applicant, and thereupon obtaining the judgment of the court directing its production."

To the same effect is U. S. vs. National Lead Co., 75 Fed. 94. That is also to the effect that the State process is not applicable to federal criminal pro-

ceedings, but that this statute applies. Therefore, there has been no explanation to the court of which letters, contracts, which documents, which exhibits, which models, which "mock-ups", which wind tunnel reports, which photographs, are desired by the defendant, and there is no way in which the Government can tell. And, in closing, that the defendant has had four and a half months in which to make this application to the court. If [27] he has failed to do so, we submit that is at present no cause for a continuance.

Mr. Lavine: In answer to that, your Honor are you through, Mr. Maury? Well, let us take this matter of the continuance up first. If your Honor please, the affidavits and the records show in this case that Mr. Zap suffered an attack of acute appendicitis and that he was in the hospital for quite some time with a ruptured appendix. We did, subsequent to that time, commence our preparation of the case, and we did go to the Douglas bomb-proof shelter. The Government's position is that the defendant, in order to get these affidavits, these papers, documents, models, and so forth, consisting of 11 to 14 boxes, large and full of material, must specify what we need and must inform the Government of defendant's case before we get it. I don't think that that position is tenable. It would be a physical impossibility to state what is in those boxes. We don't know—at least I, as counsel, don't, and my client certainly couldn't be called upon to remember those letters, or where they are, or the

contents of them. The purpose of our effort to prepare for the trial is so that we can see all of them and produce them in court and to study them and have them available. We were lulled into a sense of security by the Commander's assertion that what things we needed or wanted would be sent down to my office and that I could pick them out and segregate them and that there was nothing that they wanted to do to in any way interfere with [28] the trial or in any way prevent us from presenting a full and fair and proper defense. Now we come along to a time that the trial is about to proceed and those particular papers and documents which were promised us are not here. We never have had the contracts. We filed, in the very outset of the case, a request for a bill of particulars, and we asked, among other things, in that request, that we be furnished with the copies of the contracts which are in issue here. We are charged with an action based upon two certain contracts. The Government resisted that motion and we never have had those contracts.

The Court: What was the ruling of the court on that?

Mr. Lavine: The motion for the bill was denied, and an exception duly noted.

We also asked for information relating to the first three counts of the indictment, which relate to the wind tunnel tests at the University of Washington. Our request for a bill of particulars in that respect was denied, so that we don't know what the

charges are that the Government is coming in here to present against us, we only can guess at them; and in order to meet any of those charges we have to be prepared as to all of the wind tunnel tests which were taken at the University of Washington, and all of the bills which are presented, and all of the reports, and those constitute, from a cursory observation, possibly two or three large boxes of material. [29]

We requested a bill of particulars as to the counts 4, 5, and 6 in the indictment, relating to certain phases of the charges regarding the McAvoy flight tests; we were denied that request, and we have to be prepared to meet that on the basis of letters, correspondence, policies, and other matters that relate to that particular flight, and all the data relating to it. We could not possibly set all those up in a form of motion, except in a general way. Those are probably contained in one or two other boxes there in the shelter. * * *

Now, Commander Smith says that on any appropriate order of the court he will let us take any of those things, and we certainly should have them and should have an opportunity for consultation in connection with them. So that in order to carry out our purpose and to be amply protected, in a criminal case, unlike any of the cases the Government has cited, and unlike the situation which we are here confronted with, we requested a 10-day continuance, and an order of this court that we have all those matters made available to us for our private

consultation and study for the proper presentation here in court.

The Court: Mr. Lavine, it is a little unusual, isn't it, to wait until a jury has been called in here, 35 or 40 men, a trial date set, particularly in view of the fact that you have made, according to counsel here, and according to the record, a number of motions before other judges of this court; then to suddenly confront the trial court with a [30] motion of this kind on the opening day of trial?

Mr. Lavine: We are confronted with this unusual situation, your Honor; that only last week we had no reason to believe that there would be any other or different situation than that we would have those matters available to us. The time was then too short to make an adequate motion, and it seemed to me that the time to present the matter——

Mr. Maury: I should like to interpose a statement, your Honor, as an attorney of this court, and the man who has been in charge of this case ever since the indictment was returned, to the effect that neither counsel nor defendants have in anywise applied to our office to ask us to stipulate that they might go and see those documents, that they might be permitted to take them out of the custody of Commander Smith for the purposes of preparing for trial, or in any otherwise to ask our aid or assistance in getting their documents.

I should likewise like to state that Mr. Lavine has called me on several occasions and asked permission to see the documents which are in the pos-

session of the War Frauds Unit of the Department of Justice in this building, and that on each and every of those occasions he has been granted that right, without question. He has been accorded a room, with a table to work upon, and apologies for the poor ventilation of the safe in which those matters are kept, and he has likewise been offered space outside; further, that had he applied to the Department of Justice, every courtesy would [31] have been accorded him, stipulations would have been arranged and entered into, and applications would have been made to the court on behalf of both parties. And we feel that at this time, these papers being filed at 10 o'clock this morning, that they come too late.

Mr. Lavine: I may answer that, your Honor. In reply to the last statement of Mr. Maury, it is absolutely true that every courtesy has been accorded in reference to those papers which were taken under search warrant, or purported search warrants, and which are held pursuant to those, and which require, under the law, that a return be fully made, and that they be deposited with the court or some agent of the Government; and I have been accorded the right to see those and to go over those matters.

The same is not true, however, with reference to the matter of Commander Smith's detention of those papers; that is to say, we have been denied what we thought we would have the right to have. In other words, Mr. Maury's policy in connection with those matters in the office of that unit of the Gov-

ernment in a sense led me to believe that there would be no question about getting the other papers from Commander Smith, and Commander Smith's own statements in that respect were such as to give me the feeling that there would be no difficulty about it at the time of trial or prior to trial.

Now we only had a short time after the denial, and I did not communicate with Mr. Maury about that, but I did [32] have the word of the other custodian, and their prior resistance to our return of those papers originally is in the files here. The Government resisted the giving of those papers to us, and that resistance is in the file.

The Court: Motions will be denied.

Mr. Lavine: Exception is noted.

I have another motion that I wish to make at this time, and I will also renew it after the jury is selected, so that our record is perfectly clear, and we may not have to interrupt so fully at that time.

At this time the defendant, Edward F. Zap, objects to the jurisdiction of the court to proceed on the ground that the indictment as charged in this case and under the proceedings herein had, denies to this defendant, Edward F. Zap, due process of law guaranteed by the fifth amendment to the Constitution of the United States, in this: that he is not informed by the indictment and each count thereof of the nature and cause of the accusations against him so that he may be prepared to meet the charges herein and be prepared to defend adequately against them. The indictment herein, in counts 1, 2, and 3,

charges the defendant, Edward F. Zap, with making certain claims with relation to wind tunnel tests at the University of Washington—a certain claim. Each of these counts charges the same offense in different language. It fails, however, to descend to particulars so that the accused knows what charge it is alleged that he made, or what claim it is alleged that he presented. In [33] view of the fact that this contractor has presented hundreds of claims to the Government, and many of them relate to wind tunnel tests, it is impossible for him to know and be prepared to meet the charges at this time, and, therefore, it is a denial of due process of law guaranteed by the fifth amendment to the Constitution of the United States.

In counts 4, 5 and 6, the allegations are made that he charged a certain $4,000 item, but the allegations in those counts do not descend to particulars and do not inform the accused of the nature and cause of the accusation in such a way that he can know the nature thereof and be prepared to meet it, and, therefore, violates his rights under the fifth amendment to the Constitution of the United States, in that it denies to him due process of law guaranteed thereby. We assert, therefore, that this defendant is denied due process of law guaranteed by the fifth amendment in connection with count 13 as well.

Now we have one other further objection. The Government has split up each of these single claims into three different counts, so that it gives the indictment the appearance of a multiplicity of claims filed falsely against the Government in violation of

due process of law guaranteeing a fair trial to the accused, when, in fact, there is only one claim that has been filed as to each of these different sets of three, and only one alleged claim that is alleged to be false. It is not charged that he filed three false claims, but one [34] false claim as to each of these three items; but to the jury to which a charge of this omnibus nature is presented, it would cause the jury to think there has been a constant series of false claims here, when, in truth and in fact, that is not the actual situation alleged; and we, therefore, object to the form of the indictment as violative of due process of law guaranteed by the fifth amendment to the Constitution of the United States.

We have filed demurrers and also a request for bill of particulars as to each of the counts, which were denied and exceptions duly noted. However, we feel that the fundamental guarantees of the Constitution are involved here. We make this objection in accordance with those fundamental guarantees so that the Government may be apprised, even before the jury is selected, that that is our position and will remain our position throughout these proceedings and trial.

We also join in the demand for an election of counts; but I am premature on that, because if the court sustains my other objections then, of course, that would not be necessary.

Mr. Maury: Does your Honor wish legal argument on these matters?

The Court: You can make a statement for the record.

Mr. Maury: In the first place, the questions raised by counsel have largely been settled by the rulings on the demurrers. As to multiplicity, we are faced with prosecution under a rather peculiar statute. The statute itself [35] contains the reason for the structure, I may say, of the indictment. In the first place, it prohibits or makes criminal the filing of any false claim for payment or approval. That is, you might say, the first category of crime contained in the statute. Second, it makes criminal the filing or the use of a false representation or false statement in any matter within the jurisdiction of any department of the United States. And, third, it specifically sets out a list of various documents, that might for these purposes be read into the record—in fact, it says: "Who shall make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, or affidavit, knowing the same to contain fraudulent and fictitious statements or entries in any matter within the jurisdiction of any department or agency of the United States," and so forth. Hence, the pattern of the indictment is drafted along the pattern of the statute. Yet we feel that where a man, in the course of his business, in the first place, presents a false claim for payment, he has thereby violated the first part of the statute. If he puts false entries upon his books and makes them the basis of that claim, we believe that is another violation of the statute. And, in the third place, if he uses one of these specifically designated types of paper, a false roll, affidavit, or

false account, then we believe that is a violation of the third concept of the statute. Consequently we submit that there is [36] no multiplicity in the indictment. It may be at the close of the Government's proof that some election will be necessary, in which case the Government will probably join in the election; but at this time we feel that there are 12 separate, distinct crimes stated by the first 12 counts of the indictment.

The Court: Hasn't this already been ruled on? I read this file. What have I got to do with it? It is the law of the case.

Mr. Lavine: It isn't the law as far as the trial is concerned. It is the ruling on preliminary matters.

The Court: That is right. That has all been ruled on. Now you are asking me to reverse the ruling in this case?

Mr. Balter: Well, as far as the election is concerned, that is a new matter, your Honor.

Mr. Lavine: We have not raised the question of election. We couldn't raise it until the trial started.

Mr. Balter: I think it is good, too, because if you will read the statute, you will see it is identical.

Mr. Lavine: There is only one claim in each of these three counts, your Honor.

Mr. Maury: Well, the proof will disclose that, Mr. Lavine.

Mr. Balter: It cannot disclose any more than that.

The Court: Well, I see the position of the defendant, but I am inclined to think, gentlemen, they are separate. [37] I don't know what the evidence will show on it. The motion is denied.

Mr. Lavine: Exception noted, your Honor.

May we request at this time that the Government aid us in getting those papers, and documents, and files, from Commander Smith? I don't know how to present it. I think those papers we need for this trial would be offered to us upon any direction of the court. Commander Smith is in court at this time.

Mr. Maury: Supposing we take that up informally at the noon hour, Mr. Lavine? We can straighten it all out.

The Court: If there is any record that the Government has that will aid in this case, I will instruct the defendant be permitted to examine and receive a copy of it. [38]

Los Angeles, California, Wednesday, April 7, 1943.
10:00 A.M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. 15728. United States of America against Edward F. Zap and Lloyd Scott for further jury trial.

Mr. Maury: The Government is ready, your Honor.

Mr. Lavine: In connection with the defendant Zap, your Honor, at yesterday's conference in the morning we made a request for certain documents and articles, and I was assured that they would be here by 10 o'clock this morning. They are not here, your Honor, and we feel thereby we will be deprived of a proper cross examination of certain witnesses.

in connection with the Items 1, 2 and 3, at least, Government counsel tells me they will be here by noon, but we haven't had a chance to see them or examine them, and in view of that situation we cannot answer ready on that matter. We are confronted with that situation.

The Court: Do you know which witnesses you will want them for cross examination on?

Mr. Lavine: If they proceed on Counts 1, 2 and 3, those are the items——

The Court: Then you will be permitted to cross examine those witnesses when the documents are available.

(Counsel for the Government and the defendants and Special Agents Murray B. Myerson and James C. Sloane, [39] approached the bench.)

(The following proceedings were now had at the bench within the presence, but without the hearing, of the jury and defendants.)

Mr. Maury: Your honor, yesterday afternoon after the jury was picked, when the jury was dismissed Juror No. 2 [40] was observed to go over and shake hands with the defendant Scott, and enter into a conversation with him. Mr. Myerson, of the F. B. I., observed this; and Mr. Sloane, likewise of the F. B. I., observed this, and I would like to ask counsel if that juror may be excused and replaced by an alternate on stipulation. It is Juror Wiget.

Mr. Lavine: As far as the defendant Zap is concerned we see no reason why the juror cannot con-

tinue. The mere fact a juror speaks to a defendant, says "Good morning," or something like that, is not any evidence that he is going to swerve from his conscientious duty as a juror in the case. We are confronted every day with that situation, where a juror says "Good morning" or "Good night," and we are in a position of believing that the juries will keep their oaths as jurors. And sometimes to the Judge we say "Good morning" or "Good night." We speak to the judges. We are friendly with them. But we always observe they do their conscientious duty. The mere fact a Judge speaks to an attorney, or the juror speaks to someone connected with the case, does not mean he is in any way influenced by that fact.

The Court: What do you have to say, Mr. Balter?

Mr. Balter: The defendant Scott told me that last night. He said there was a member of the jury stepped up to him and said he had served in the Spanish-American war, or something of that sort, and defendant Scott acknowledged the courtesy, and that is all there was to it. As far as [41] I am concerned, it is up to the discretion of the court.

Mr. Lavine: I raise an objection to the juror being excused on that ground.

Mr. Balter: The defendant Scott doesn't know the person anyway.

Mr. Maury: We object chiefly on the ground that on page 48 of the transcript, it appears, by negative answer, this juror, amongst all the rest, said, under oath, to this court, that he did not know either

party at all, or any of the Government counsel, and that was about 11:30 o'clock in the morning; by 5 o'clock in the afternoon he is very cordially addressing one of the defendants as a man with whom he had had some previous experience, and now it appears it was in the Spanish-American war.

Mr. Lavine: I object to counsel's statement. It doesn't appear there is any connection between the two.

Mr. Maury: It does so appear from Mr. Balter's statement.

Mr. Balter: Scott never served in the Spanish-American war. It seems to be simply a friendly gesture. And this we know, the approach was not made by us, it was made by the juror.

The Court: Who was the juror?

Mr. Maury: Juror No. 2.

The Court: And who was the Government man who saw this?

Mr. Maury: There were two, your Honor. Mr. Myerson [42] and Mr. Sloane.

The Court: Swear Mr. Myerson.

MURRAY B. MYERSON

called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maury:

The Witness: It was immediately upon leaving the court room, and I left shortly after 5 p. m. I

(Testimony of Murray B. Myerson.)

left the court room immediately behind the juror, Juror No. 2, and with Special Agent Mr. Sloane right behind me, we entered the corridor together, behind the juror, and the defendant Scott was standing in the corridor, and the juror in the hallway—immediately outside the court room. The juror approached him, put out his hand and called Mr. Scott by name, and referred to the conversation he had with him, I believe a telephone conversation; the exact words I don't remember; I believe he spoke about the sinking of some boat—he had spoken about the sinking of some boat. I cannot recall what words were used with reference to the telephone conversation.

The Court: How did you use the word "telephone"?

The Witness: It is my recollection as the juror left Mr. Scott that he made reference to a telephone conversation which he had brought up in this matter of the boat; with Commander Scott still speaking, and Commander—he left him. [43]

Mr. Lavine: I want to cross examine this man.

The Witness: As they started to speak, I would say I was within five feet of the juror—walking towards the elevator bank. Lt-Commander Scott was immediately outside the court room, facing the court room. The other man was immediately outside of the court room facing Commander Scott. I got just outside of the door, within 18 inches of the juror. I stopped almost immediately, I would say

(Testimony of Murray B. Myerson.)

within 12 or 15 feet of where the conversation was taking place. The juror was speaking in a rather loud voice. I saw no other jurors at the time. I think Special Agent Sloane was right behind me. I don't recall who else was there. I was immediately at the place. I stood still then. That is all I remember. I heard nothing more than what I have told.

JAMES C. SLOANE,

called as a witness, being first duly sworn, was examined and testified as follows:

Direct Examination

As I left the court room yesterday shortly after court adjourned, Mr. Myerson preceded me out in the hallway, when I got out of the court, the second juror,—Mr. Wiget is his name—when he got out in the hallway, Commander Scott was facing him—

Mr. Lavine: We object to that now. He is talking [44] so loud the jury can hear him. He is talking so the jury can hear him.

Gentlemen of the jury, have you heard any of the conversation that has gone on up here before the court? Any juror?

A Juror: I can hear a part.

The Court: What have you heard?

A Juror: Someone mentioned a Juror No. 2. That is all I heard.

(Testimony of James C. Sloane.)

The Court: Did you hear any conversation about it?

A Juror: Nothing other than that.

The Court: You heard the words "Juror 2"?

A Juror: I heard the other man say something about some conversation in the hall. I wasn't paying any particular attention. I was not trying to hear it.

The Court: Now, just tell us exactly what you heard. You heard the words "Juror No. 2" mentioned?

A Juror: Just by the gentleman up there.

The Court: No language?

A Juror: That is all I heard. He turned around and look over this way right after he mentioned it.

The Court: Any other juror?

Another Juror: I heard the same thing, and heard the words, but nothing to make any sense any more than "Juror No. 2."

The Court: Any other gentleman? [45]

A Juror: The only thing I heard was some conversation held in the hall, and I also heard that from this gentleman here.

The Court: You heard no other language about it?

A Juror: That is all.

The Court: I knew they didn't get what we were talking about. Lower your voice now.

The Witness: Just as I came out in the hall——

The Court: No, you are talking too loud.

(Testimony of James C. Sloane.)

The Witness: Commander Scott was in the hall facing the door and as I came out of the court room after Mr. Myerson, shortly thereafter Juror No. 2 came out and spoke to Lt-Commander Scott in a rather friendly tone of voice, asking him if he recalled him, who he was, and he told him at one time —he said, "You remember me? I had a telephone conversation with you." At that time he said, "You remember me?" And I remember particularly this one thing, he said, "You gave me certain information over the 'phone, and then you remember I told you what a good name Scott was." I remember that very distinctly. After I heard that I walked on down the hallway. That is all. I do remember those two things rather specifically.

The Court: Cross examine.

Mr. Balter: The defendant Scott didn't say that he knew this man?

The Witness: Commander Scott was just more or less [46] like I would walk up to anyone after probably—I would say in a rather nonplussed manner—well, maybe I don't recall you.

Mr. Balter: He didn't say he knew this man?

The Witness: I didn't hear him say that he knew the man, no.

Mr. Balter: That is all I care to ask you.

Q. By Mr. Lavine:

The Witness: I was right within three feet and a half of him coming out of the door when I heard this conversation. I think I closed the door and the

(Testimony of James C. Sloane.)

juror came out after me. I don't—I stood there in the hall and lit a cigarette and he walked over and spoke to Mr. Scott. I didn't pay particular attention to the door.

Q. Where was Mr. Myerson?

A. Mr. Myerson had gone on ahead of me a little bit down the hall going—oh, probably six or seven feet on his way down the hall.

Q. And did the juror then walk on?

A. Well, now, after he finished. He shook hands with him and walked on down the hall and left. That is all the conversation I heard; yes, sir. Those two things I remember specifically is all I heard. I didn't hear Scott say anything.

The Court: Now, gentlemen, I have only one interest in all of these cases, and that is to see that we get a fair trial here. Both defendants here are accused of a serious [47] offense, and we want a fair trial here from the Government standpoint, as well as for the defendants, and that is the only interest I have. Yesterday Mr. Lavine objected to one of the jurors for cause, if you will remember, because he was employed by the Government, and in a capacity that did not have any connection with this case at all; technically and properly speaking it was not a proper challenge for cause, in my opinion, but with all these jurors here there was no reason in the world for not granting Mr. Lavine's request, without even hearing from the Government. Why? Because I didn't want the defendants to feel that

(Testimony of James C. Sloane.)

I want any man on this jury who has got any connection, any feeling of any kind, or bias on either side, so I immediately granted Mr. Lavine's request and excused him for cause, which I don't think technically was correct. Now, that is my situation with this juror. This is a serious matter to have a juror go out of this court room and approach a defendant, shake hands with him, and speak to him, particularly when these jurors were warned that they were not to speak to anybody about this matter—twice yesterday. This juror does not seem to appreciate the great responsibility that is upon jurors, gentlemen. Now, that is my position in this case and I feel that this is much more serious than the objection that was made.

Mr. Maury: The Government feels unless counsel are willing to stipulate that the juror may be excused and re- [48] placed by one of the alternates that the Government will be forced to move the court for a mistrial at this point.

Mr. Balter: As far as I am concerned I have no objection to him being excused, just so the rights of this defendant are saved and protected before this jury. I don't want the jury to get anything in the way of a wrong impression here. And, furthermore, I object—I strongly object to any proceeding on the part of the Government of tailing jurors.

The Court: This man just walking out, the record shows, without any intention—they had no idea of speaking to this juror—so if there is any doubt

(Testimony of James C. Sloane.)

about it, gentlemen, I will take it under consideration and study it out, and we can get another juror tomorrow morning on the telephone, because we have a very long and large list here.

Mr. Balter: Couldn't we take an alternate by stipulation and choose the alternate by lot?

The Court: Supposing you have sickness during the trial?

Mr. Lavine: Your Honor, we have made a very serious accusation—the Government has made a very serious accusation against a juror——

The Court: That is right.

Mr. Lavine: And that juror has the right to have his day in court, too, I think.

The Court: I will examine him right now. I will give [49] him his day in court. I will examine him right now.

Mr. Lavine: I think that we have a right to do that.

Mr. Balter: I don't think so. I won't take that position because that juror will be placed in a very uncomfortable position, and he may lean backwards in his decision, and as far as I am concerned he is disqualified.

Mr. Lavine: All right.

Mr. Balter: I mean if your Honor feels he is disqualified, I am perfectly willing to agree to it.

Mr. Maury: Thank you, Mr. Balter.

Mr. Balter: He would be embarrassed in front of himself and all the other jurors. I think under the circumstances, if you feel that way——

(Testimony of James C. Sloane.)

The Court: It is nobody's fault. You gentlemen are not to blame.

Mr. Maury: Not at all.

The Court: I want the record to show that.

Mr. Balter: Thank you, your Honor.

The Court: I want the record to show you did not make the advance, the advance was made by the juror. That is what the testimony shows. And particularly an officer in the Navy, I am sure he would not make an advance to a juror in the trial of his case; he may have slipped in some other matters, I don't know, but he wouldn't do that, in my opinion.

Mr. Lavine: I may say, that I particularly cautioned my client not to blush almost at the jurors, so we have [50] been very careful that nothing like this would happen, and we regret the situation very much, but I don't like to have the whole setup upset here, we have spent considerable time with the court and all of the parties to try to proceed properly.

Mr. Balter: I think we ought to proceed with one alternate and then we can stipulate——

Mr. Lavine: All right.

Mr. Balter: We are willing to stipulate that one of the two alternates be drawn by lot, and we have only one alternate, and if any untoward reason arises, which we cannot foresee, we will stipulate the case may be decided by 11 jurors.

Mr. Maury: The Government is willing to so stipulate.

(Testimony of James C. Sloane.)

Mr. Lavine: And I will join in that.

Mr. Balter: Your Honor, use your own good judgment as to how to handle this situation, so that the rest of the jury gets no feelings about this.

The Court: I will just excuse him. They will never know anything about it. It is none of their business.

Mr. Balter: You handle that in your own way, your Honor.

The Court: I am not going to embarrass anybody.

Mr. Balter: Thank you, your Honor.

(Proceedings were now resumed within the hearing of the jury and defendants.) [51]

The Court: Mr. Wiget, you will be excused from further jury service. You will be excused.

Mr. Cross, will you place in the box the names of Mr. Tom T. McCarty and Mr. Marks?

The Clerk: Yes, your Honor.

Juror No. 2: May I stay in the court room?

The Court: You are excused. The two alternates that have been heretofore drawn and are serving and sitting in the jury box, will you please draw one of those to replace the juror, Mr. Wiget, who has been excused?

The Clerk: Mr. C. E. Marks.

The Court: Mr. Marks, you take that seat.

Gentlemen of the jury, I will now read to you the charges, in the simple language, called the "Indictment."

(Testimony of James C. Sloane.)

(The indictment was then read to the jury.)

Mr. Maury: At this time, your Honor, may I call attention to the fact that Commander C. A. Smith, of the United States Navy, has the documents and records which [52] Mr. Lavine has been requesting, and that I should like to tender them to Mr. Lavine for his scrutiny, at any convenient time.

Mr. Lavine: Yes, your Honor, may we have the record show that at 11:20, on the second day of trial, that the documents in the possession of the Government vital to the defense have been tendered to the defense?

Mr. Maury: Stipulate that that is the time of day, Mr. Lavine.

Mr. Lavine: Yes, sir. At this time I wish to renew my motion made before the trial commenced, at the bench, that the defendant is denied due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, and on all the grounds therein set forth at that time.

The Court: The motion will be denied.

Mr. Lavine: Exception noted.

COMMANDER G. A. SMITH,

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Glenn Albert Smith.

(Testimony of Commander G. A. Smith.)

Direct Examination

By Mr. Maury:

Q. What is your rank, sir? [53]

A. Commander of the United States Navy, retired, on active duty.

Q. How long have you been connected with the United States Navy?

A. Since 1907. I entered the Navy in 1907, graduated from the Naval Academy at Annapolis in 1911; served in the Mexican war, in the Caribbean, served in Cuba several times, where I went ashore with the Bluejackets looking out for American interests; 1914 and 1915 I was on special duty in the Mediterranean, and in certain parts of Europe; in 1917 I had command of the mine forces preparatory school at Newport; later was mining officer on the "Hoositanic", which with other ships in the American mine forces put down a mine field between Scotland and Norway; after the war I went into aviation, had command of several squadrons and training activities, assembly and repair duties; was air officer of the aircraft carrier "Lexington" for two years, and my last sea duty was as captain of the destroyer "Elliott."

Q. Where are you stationed now, sir?

A. Stationed at the Douglas Aircraft Company, Santa Monica, California.

Q. How long have you been so stationed?

A. For a little over two years.

(Testimony of Commander G. A. Smith.)

Q. What have been your duties during that period of time?

A. Inspector of naval aircraft. [54]

Q. Are you acquainted with the Aeronautical engineering plant of the defendant, E. F. Zap?

A. Yes.

Q. By Mr. Maury:

I am familiar with these two contracts which have been discussed; that is contract 83142, between the Navy and the defendant Zap, and with contract No. NXs-4105.

(Government's Exhibit No. 2 was offered in evidence and admitted as to the defendant Zap, and was thereupon read by Mr. Maury to the Jury.)

Mr. Zap subcontracted in the first stages of his work. To the best of my knowledge, the first contract or subcontract was with Northrup. Well, as a matter of fact, Mr. Zap had an earlier contract, No. 75017 and 75020 with the Northrup at that time. The 83142 was largely performed at Hardman Aircraft, and after that by Hamilton, as subcontractors to E. F. Zap. In other words, at that time Zap did the experimental work, the experimental engineering, but the actual work that was being done on contract was being done, first of all, by Northrup.

After contract 83142 was let, the first work on that was done by Hardman Aircraft. Zap and his staff simply did the engineering work and let out the subcontract to Hardman. The production or manufacturing work was done—the first of it was done by

(Testimony of Commander G. A. Smith.)

Hardman. Then Hardman went into bankruptcy [55] There was quite a delay there in performing Zap's work on account of that. I wouldn't say it was about four months delay. I wouldn't say it was that long. We got that matter straightened out and we thought fairly promptly. At any event there was some delay, and the Navy and I cooperated [55-a] in trying to see that it got straightened out so that the Zap production could go ahead in every way possible.

After the Hardman difficulties there was another subcontract let to Hamilton Aero. In other words, Zap and his organization merely did the engineering, and Hamilton Aero was doing the actual manufacturing or construction. To the best of my knowledge, Hamilton Aero continued out there at the Hardman plant for several months and then rented and started another plant in Beverly Hills. Then in the earlier part of 1942, about May 22nd, the Defense Plant Corporation agreed to build Zap a plant for his own purposes, to go ahead and do the work in his own plant. Sponsored by the Navy, the D.P.C. obtained a plant. I helped all I could to advance the interests of E. F. Zap, and forwarded letters to the Bureau in connection with that plant and approved its construction.

Q. I will show you a letter, Commander Smith, and ask you if that is a copy of a letter that you sent to the Bureau, approving of the plan to provide Mr. Zap with a plant of his own in Westwood?

(Testimony of Commander G. A. Smith.)

Mr. Maury: Government stipulates that it was, Mr. Lavine.

The Court: All right.

Mr. Lavine: Accept the stipulation and offer the letter in evidence.

"From: Inspector of Naval Aircraft, USN, c/o Douglas [56] Aircraft Company, Inc."

The Court: Just a minute, now, until we get the number of that, so that we will have our record.

Mr. Lavine: Pardon me. I am sorry.

The Clerk: That will be Defendant Zap's Exhibit A.

(The document referred to was marked as DEFENDANT ZAP'S EXHIBIT A; and was received in evidence.)

Mr. Lavine: "From: Inspector of Naval Aircraft, USN, c/o Douglas Aircraft Company Inc., Santa Monica, Calif.

"To: The Chief of the Bureau of Aeronautics.

"Subject: BuAer Reqn. 315—Series 1942—Schedule 500-3808—Proprietary—Experimental Program of Construction of Folding Wings and Center Section Incorporating Zap Full Span Flaps and Ailerons for Model F4F-3 or F4F-4 Airplanes. (R.I.N.A. El Segundo, Calif. letter F4F (A-4) (C-150) dated 22 May 1942)

"1. Forwarded for the Bureau's consideration.

(Testimony of Commander G. A. Smith.)

"2. The plan outlined in basic letter appears to offer the best method of providing needed facilities to the Zap Corporation to enable them to fulfill their obligations to the Bureau under the forthcoming subject contract.

"3. Approval of this plan is recommended provided it does not block or delay the present [57] approved plant expansion in the area in the case of Pacific Aviation, Plan or Number 828.

"4. It is recommended that this correspondence be shown to Lt. Comdr. G. Norton, U.S. N.R. of the Plant Facilities Section of the Bureau.

"G. A. SMITH

"Comdr. USN (Ret.)"

Mr. Maury: May it be stipulated, Mr. Lavine, that the reference to the Zap Corporation therein is a misnomer; that no corporation was involved?

Mr. Lavine: That is correct. It may be stipulated that the Zap Corporation, which may be shown in various places as such, is E. F. Zap, as an individual; that that was simply used as a name at frequent times. I think it appears in other correspondence and other documents that may come up, so I am willing to stipulate that they refer to E. F. Zap individually, operating as Zap Engineers or Zap Engineering Corporation, or Zap Corporation; that in all those cases it refers to E. F. Zap. I would also like to call attention to that paragraph three there

(Testimony of Commander G. A. Smith.)

which says that this is not to interfere with any plant expansion in the case of another company:

By the Witness:

Now, in connection with this plant—it was fully set up and equipped. It was rented, occupied, and being equipped. It was not fully equipped. The Government spent approximately $67,000 on that. You could get the exact information [58] from the Defense Plant Corporation on that. I, myself, approved many other things at the Zap plant, however, prior to that time. I approved any and all matters to successfully prosecute that contract that was referred to me.

Mr. Lavine: That is all, thank you.

Recross Examination

By Mr. Lavine:

Q. Commander, in connection with the vouchers that are submitted to the Navy Department for payment, you were the one that approved those vouchers, weren't you?

The Court: Vouchers for what?

Mr. Lavine: Vouchers for payments for money or claims in connection with contract 83142, and 4105.

The Witness: I approved a very few of those, and I would prefer that any questions about vouchers be addressed to the Navy Cost Accounting Officer whose specific duty it was to handle matters like that.

(Testimony of Commander G. A. Smith.)

Q. By Mr. Lavine: But you did approve some of them?

A. I approved some—I authenticated some expenditures, under these two contracts, but information in regard to that should be obtained by the man detailed specifically to handle it.

Q. By Mr. Lavine: Well, Commander, I show you some memorandums here, the last one being November 17, 1942, "Public Voucher for cost-plus contracts." "G. A. Smith." [59] Made out to "Aviation, Navy, Edward F. Zap, United States Debtor, to Edward F. Zap, NXs 4105, 15th May, 1942." Is that one you approved?

A. I would like to answer this by calling your attention to the fact that the Navy cost acounting officer certifies all of these vouchers prior to submitting them to the right officer for authentication, and any question in regard to the finances, I repeat that I think they should be referred to the officer detailed to handle the auditing and the accounting. In other words, I usually rely on the auditor; when he comes to me and says, "This is correct," then I rely on him and sign my name. The original might have my signature on it. I have approved vouchers in the amount of approximately $4,235.45, but right at this minute I couldn't identify that because of the large amount of vouchers of that nature I handled with other companies. Here is one dated September 30, 1942, which is for $1,040.24, I believe, amount payable, and it has my name on the left hand side

(Testimony of Commander G. A. Smith.)

and Minor's on the right hand side—I relied on the fact that the Naval Cost Inspector approved that one. They go on to the proper authority. In matters of this nature, where so much money is involved, the cost accounting officer will have a copy of all correspondence. In matters involving the countersigning of checks I have a record of each and every check, but in the matter of the vouchers and the claims, the cost accountant is the one who handles those primarily. [60] I rely on his accounting for the purpose of my examination and signature—he and his assistants. And to all of these various memorandums here, assuming that I signed the originals: dated July 3, 1942, to Edward F. Zap, in the sum of $10,829; and July 18, 1942, in the sum of $5,289.30; and in the sum of $6,677.81, dated August 6, 1942, to Edward F. Zap; and in the sum of $36,500, dated August 12, 1942; and August 17, 1942, in the sum of $3,665; and on August 17, 1942, the same amount—maybe that is a duplication; and on September 30, 1942, in the sum of $1,040, to Edward F. Zap; and November 17, 1942. There are two different accounting officers mentioned, Ensign Minor and Ensign Hershberger, and for that reason, and others I have given, I would prefer not to make a positive statement until those documents could be checked by the officer detailed that is the authority on that subject.

LUCIEN SMITH MINOR,

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Binns;

I am Lieutenant, junior grade, United States Naval Reserve, assigned as Assistant Cost Inspector, Douglas Aircraft Company, El Segundo. I have had that assignment approximately six weeks. Prior to that I was acting cost [61] Inspector at Douglas, with additional duty as acting cost Inspector over the contracts with E. F. Zap. I went on duty as acting cost Inspector, I believe it was February 1, 1942. I am familiar with the contract that Zap had with the Navy in February, 1942. The one contract over which our office had cognizance from a cost standpoint was NOs 83142. NOs, I believe, designates the Bureau which issued the contract.

The Clerk: That will be Government's Exhibit 3, for identification.

(The document referred to was marked Government's Exhibit No. 3, for identification.)

Mr. Binns: The first instrument is dated 18 March, 1943, and is entitled "Copy of Contract NOs 83142 dated 22 March 1941 and supplementary dated 13 December 1941." This first group, your Honor, contains the contract and one of its supplementaries. And the supplement is dated the 13th of December, 1941. The next group of documents,

(Testimony of Lucien Smith Minor.)

totaling 31 pages, fastened together with a blue ribbon and sealed with the seal of the Navy Department, designated as "1 April 1943"—these constitute letters between the Navy Department and E. F. Zap which in some manner vary the terms of the original contract. The next group of documents, constituting seven sheets, fastened together with a blue ribbon and sealed with the seal of the Navy Department, purports to be true copies of records in connection with contract NOs 83142. [62]

Mr. Lavine: In connection with that last offer, your Honor, there is one page in there that is not photostated. There is one page that is not photostated, apparently. It doesn't appear to me to be. It is on white and black, instead of black and white. However, I would like the record to show that the files of Mr. Zap were turned over to us in court here, we have a copy of the contractor's contract, and since it has been turned over to us—it was taken by the Government at the time of their taking of all of the files and records, and our file does not show that page. We would like to offer the file of the contractor showing the contract and all the documents that he had, as received by the Government, so that there cannot be any question about what we have got.

Mr. Binns: If your Honor please, we have no objection to Mr. Lavine offering whatever copy of the contract he has at the proper time.

The Court: He hasn't a copy; his is the original.

(Testimony of Lucien Smith Minor.)

Q. By Mr. Binns: Lieutenant, I show you Government's Exhibit 3, for identification, and ask you, is that a copy of the contract NOs 83142 that you have just referred to? A. Yes.

Q. And the other documents in that group, are they copies of supplemental letters in connection with that contract?

A. Yes, I would say all of the documents relate in [63] some manner to the original contract.

Mr. Binns: I offer Government's Exhibit No. 3 for identification in evidence at this time.

Mr. Lavine: You can offer it in evidence as far as I am concerned.

The Court: In evidence.

The Clerk: Government's Exhibit 3, admitted into evidence.

(The document referred to was marked Government's Exhibit No. 3, and was received in evidence.)

Mr. Binns: I desire to read one small portion of the contract at this point, and one of the supplemental papers at this time, your Honor.

The Court: Proceed.

Mr. Binns: "E. F. Zap, January 29, 1942.

"Restricted

To: Resident Inspector of Naval Aircraft, U.S.N., Douglas Aircraft Company, Inc., El Segundo, California.

Subject: Contract 83142 — Flight Test on OS2U-1 Airplane Zap Folding Wing Version—Quotation on.

(Testimony of Lucien Smith Minor.)

Reference:

(a) Specification SE-38C

Enclosure:

(A) Zap Report No. 135—Proposed Preliminary [64] Flight Demonstration Schedule.

1. Since no provisions for preliminary flight demonstration were included in subject contract and since the project is entering the final stages of completion, the contractor has taken the liberty to investigate the possibilities of conducting the flight tests on the subject airplane and respectfully submits herewith a quotation covering the cost breakdown based upon the program outlined in Enclosure (A).

a. Chief Test Pilot's Fee & Insurance	$ 4,000.00
b. Flight Engineer Fee & Insurance	650.00
c. Ground Crew	900.00
d. Special Equipment Rental	320.00
e. Gasoline and Oil	180.00
f. Flight Engineering — Reports Evaluation	2,900.00
g. Crash Insurance	4,200.00
h. Ground Coverage Insurance 30 days	580.00
i. Public Liability and Property Damage Insurance	180.00
	$13,910.00

(Testimony of Lucien Smith Minor.)

j. Contractor's Fee at 6%	834.00
Total Cost	$14,744.00

2. Tests outlined in Enclosure (A) will involve approximately 15-20 flight testing hours in Los Angeles area.

3. In accordance with Reference (a) Paragraphs B-6, [64-a] the Contractor herewith proposes to employ Mr. Wm. H. McAvoy as chief test pilot to conduct the tests outlined in Enclosure (A). Mr. McAvoy's long experience with the N.A.C.A. makes him particularly suited for this demonstration. In addition the contractor proposes to employ Mr. Harold E. Dale as flight engineer. Mr. Dale's position as assistant chief engineer for this contractor qualifies him to direct the demonstrations outlined in Enclosure (A) and makes observations useful to the Bureau. It is the contractor's intention to make additional flights to determine results of various aileron-vane settings, tuft tests for observation of flow characteristics, take-off and climb tests involving various flap positions, and minor aerodynamic investigations and adjustments to enable the contractor to submit the subject airplane for final demonstration in its most advantageous condition. For this reason it is highly desirable to have a flight after the first pilot's familiarization flight.

EDWARD F. ZAP".

(Testimony of Lucien Smith Minor.)

"Restricted
C-83142

(C-19) A-5 1st Endorsement January 30, 1942
From: Resident Inspector of Naval Aircraft,
El Segundo, Calif. [64-b]

To: The Chief of the Bureau of Aeronautics.
Subject: Contract 83142 Flight Test on OS2U-1 Airplane Zap Folding Wing Version Quotation on.
(E. F. Zap, Los Angeles, Calif. letter Z-422 dated January 29, 1942).

1. Forwarded for the Bureau's consideration and action.

2. Based on past experience, it is the Inspector's opinion that the contractor has underestimated the costs to be incurred in connection with engineering, reports and ground crew for conducting the flight test of subject airplane. Consequently the prices quoted are considered reasonable.

L. V. SCOTT"

(Testimony of Lucien Smith Minor.)

And another letter,

"Navy Department
Bureau of Supplies and Accounts
Washington, D. C.

Restricted Nos-83142 SPH6

29 June 1942

Mr. E. F. Zap
1005 Broxton Avenue
Los Angeles, California

Via: The Resident Inspector of Naval Aircraft,
El Secundo, California

Subject: Contract No. 83142, Schedule 500-2518—Zap Folding Wing—Flight Tests [64-c]

Reference: Your letter Z-422-HD:1h of 29 January 1942

Sir:

Contract NOs-83142 is hereby modified to provide for flight tests on OS2U-2 airplane Zap folding wing version in accordance with the reference and the schedules report enclosed therewith. The total estimated cost of this work authorized by this change is determined to be $13,910.00. The fixed fee payable in accordance with the terms of the contract is $834.60.

Payment will be made for the work (labor, material, etc.) involved in this change at cost determined in accordance with the terms of the contract plus a fixed fee of $834.60.

(Testimony of Lucien Smith Minor.)

The above increase will be chargeable to the appropriation 1741502. (4) Aviation Navy 1942, Subhead VIII.

Observation landplane——"

The rest of the paragraph contains certain technical data.

"Respectfully

M. A. NORCROSS

Purchasing Officer

Bureau of Supplies and Accounts"

Q. By Mr. Binns: Now, then, Lieutenant, during your [64-d] tour of duty in connection with the Zap plant, was any other contract entered into with the United States Navy?

A. Yes. Contract NXs 4105 was executed, I would say, in May or June of 1942. There was a letter of intent, however, outstanding on that contract several months previously.

Mr. Binns: May these two documents, the first designated as "Copy of Confidential Contract NX3 4105 dated 15 May 1942," and the second group designated "Papers are true copies of records in connection with contract NXs 4105," be marked as the Government's next in order, for identification?

The Clerk: That will be Government's Exhibit 4, for identification.

(The document referred to was marked Government's Exhibit 4, for identification.)

Mr. Lavine: I didn't hear the last answer of the witness; something about letter of intent.

(Testimony of Lucien Smith Minor.)

The Court: Will you read it, please, Mr. Reporter?

(Answer read.) [64-e]

By the Witness: In contract 83142, the fixed cost item, the contract provides that the contractor will receive a fixed sum for doing the job, irrespective of what his costs are; whereas, in the cost of a cost plus a fixed fee item, the contract provides that the contractor will be paid cost, as determined by the Bureau of Supplies and Accounts, plus a stipulated fee.

They phrase "Estimated cost" is an estimate agreed upon between the Bureau and the contractor as to approximately what it will cost to produce the contract, and the fixed fee is based on this estimate. If is a percentage of the estimate. The fee, however, will be definitely determined and will not increase. If the actual cost was less than the estimate, on these particular contracts, the contractor would get his actual cost, plus the fee originally agreed upon. If the actual cost was larger than the estimate, if considered justifiable, he would get the actual cost, plus the original fee stipulated.

Under contract 83142 Mr. Zap would secure reimbursement for fixed cost items. Mr. Zap would, I believe, be required to prepare an invoice, itemizing the particular item in question, stating that the job had been completed, and forward that claim to the Bureau of Supplies and Accounts in Washington, via the Inspector of Naval Aircraft; the inspector

(Testimony of Lucien Smith Minor.)

would endorse the invoice or the letter, as the case may be, indicating therein if the contractor's claim as to the [65] completion and the acceptability of the item was correct; and on the basis of the inspector's endorsement the Bureau would issue a check in payment of the item. That particular voucher would not go through my office. Not under normal conditions. Under contract 83142 Mr. Zap would secure reimbursement under a cost plus a fixed fee item.

As he accumulated costs according to the particular contract, he would notify the cost inspector and request that the charges be audited and approved and the necessary vouchers prepared. After our office had conducted a preliminary audit and reviewed the items, the voucher would then be prepared, forwarded to Mr. Zap for his signature, then after being signed by the cost inspector would be forwarded to the disbursing officer in San Diego, who would prepare the check. The inspector I mean is the Inspector of Naval Aircraft. The documents underlying the voucher would generally be approved by the resident inspector.

At the time I reported for duty I believe Mr. J. W. Combes was handling the contract. He was subsequently transferred to other work. Mr. Hilton Byers took his place. Assisting Mr. Byers were Mr. T. A. Balzer and J. C. Watkins. Mr. Byers would not spend his full time at the Zap Company, and Mr. Balzer would not spend his full time at the Zap

(Testimony of Lucien Smith Minor.)

Company. None of the other gentlemen spent their full time at the Zap Company.

Mr. Combes, Mr. Balzer, Mr. Byers and myself are not [66] individual engineers. In performing our duties, we depended for engineering knowledge upon the resident inspector or his delegated representative. The resident inspector upon whom we depended was Lieutenant Commander Scott.

In the case of purchases of material for the contract he would approve the purchase as being necessary for the performance of the contract. He would also approve the material as being satisfactory in quality; he or his representative. He would certify to the arrival of the material that it was received.

Q. By Mr. Binns: Can you tell us what Lieutenant Commander Scott's duty was in connection with other items besides material?

In Contract NXs 4105, there was a difference in that contract in the way that Mr. Zap would secure reimbursement for fixed price items.

I believe that contract provided, in the case of one item on there, I think, for partial payments. In other words, on a fixed price item he did not have to wait until he had completed the item before he could obtain payment. I think the contract stated that when the work was 90 per cent completed he could obtain 80 per cent of the cost. [67] The resident inspector of Naval Aircraft would determine when it was 90 per cent completed.

Directing my attention to the cost-plus portion of

(Testimony of Lucien Smith-Minor.)

NXs 4105, the securing of reimbursement under that portion of the contract, the securing of the final reimbursement, did not differ in any way from what I have told you applied to contract 83142. There was, however, an advance fund, an advance payment account provided for that particular contract, from which the contractor could obtain temporary payment for cost incurred in connection with the contract. It was operating on a revolving or impressed fund basis.

The terms of the contract provided that the contractor could make withdrawals from that fund to cover costs which actually had been incurred directly in connection with the particular contract and which either had been paid or would be paid for shortly. So in order for Mr. Zap to obtain reimbursement the procedure he followed was to prepare a certification indicating the total amounts of expenses which he had incurred in connection with the contract, and forward that certificate, along with a letter requesting permission to withdraw the amount indicated on the certificate from the fund, to the Inspector of Naval Aircraft, via the cost inspector. The cost inspector's office made a very preliminary review of these charges; not an audit or a detailed audit at all, because the contract provided that he could even withdraw before he had actually paid the item himself, so it was a [68] very cursory review. If found to be generally in order, his certificate was forwarded to the Inspector of Naval Air-

(Testimony of Lucien Smith Minor.)

craft, with a recommendation that his check be countersigned and Mr. Zap be permitted to withdraw the funds from the account.

Q. Now, then, in order to replenish the revolving fund, what procedure would Mr. Zap go through?

A. Well, after he had actually paid the items, or in the case of accruals substantiated the fact that they were proper accruals, items charged to the contract, the cost inspector's office would then make an examination of the items, and if on the basis of that examination they seemed to be in order, a public voucher was prepared in payment of those items. The public voucher would then be routed to Mr. Zap for his signature, to the inspector for his, and the signature of the cost inspector, and forwarded to the disbursing officer for payment, who would draw a check in favor of Mr. Zap, indicating on the check that it was for deposit only in this advanced payment account. Mr. Zap always used the revolving fund in securing reimbursement for cost plus items under 4105, after its establishment. Before the revolving fund was established he would have to have a public voucher prepared in the same manner as I just outlined, after we had audited the items. Then that voucher would be passed to him without any restriction; he could use it as he saw fit.

Regarding an audit of a cost-plus item of a contractor's [69] contract—it would be best to segregate the cost in the general classifications. There would be direct labor, direct material, other direct charges, and overhead expense.

(Testimony of Lucien Smith Minor.)

In the case of a direct material purchase charged to the contract, the first step in the audit would be to ascertain that a purchase order had been issued for the particular material in question; that this purchase order had been approved as to price, necessity for the material, and so forth, by the resident inspector of Naval Aircraft or his representative. The next step would be to compare the vendor's invoice with the purchase order to determine that the terms indicated on the invoice, the prices and so forth, were in agreement with that stipulated in the contract, or, rather, the purchase order. Then the quantity indicated on the invoice would be compared with the receiving report, which was evidence that the material had been received. That receiving report would be reviewed to determine whether it had been approved by the resident inspector as to the quality of the material and to the quantity. Then the extensions of the vendor's invoice would be checked to verify the charge. On the test check basis examinations would be made of the cancelled checks payable to the vendor to ascertain that the liability accounts had been paid as evidenced by the vendor's endorsement and the cancelled check.

On the next classification—direct labor. The audit there would consist principally of ascertaining that the [70] charges entered to a particular contract or section of a contract for labor were in agreement with the allocation of time as set forth on the contractor's basic or original time records, or the time

(Testimony of Lucien Smith Minor.)

cards in this case; that the extensions to contracts were correct; that the hours at which the time was extended were the approved rates; and, lastly, that the amounts entered in the payroll records as having been paid to a particular employee actually were paid to that individual. You determine that point by occasional witness of payoff, identify the individual, and by examination of cancelled checks endorsed by the payee. Other direct charges would be in a manner practically identical with direct material.

All items charged to overhead expense, or, I would say, practically all items would be reviewed to determine their allowability as an element of cost under the provisions of the contract, and under the provisions of Treasury Decision 5000, there being certain types of items not allowable. After determining that the item was a proper charge; that is as to its nature, it would be checked back to a purchase order, in the event it was supplies, if it was an item of that nature charged to overhead expense, to determine prices; the extension on the item would be checked; the cancelled checks would be examined, on a test basis, to determine if the liability had been paid; accruals, and so forth, would be examined as to their propriety; labor would be traced to the payroll records. I think that is all. [71]

Instead of making a detailed audit of every transaction on items of a similar nature, we would select just a percentage of them for detailed check. As-

(Testimony of Lucien Smith Minor.)

suming that we found those in order, or reasonably so, with very few errors, it would be satisfactory to accept the total on the basis of an examination of the percentage of the total. We felt that we could determine whether liabilities recorded on the books could have been satisfactorily paid without making a 100 per cent examination of the cancelled checks.

A receiving report is a report prepared by the contractor indicating certain materials have been received from the vendor. It would indicate, I believe, in the case of Mr. Zap's records, the purchase order number, the contract, and so forth. It indicates the quantity received and the date on which received. We relied on the resident inspector's representative's signature as to quantity and so forth. [72]

WILLIAM HENRY McAVOY

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Miss Arbuthnot:

My address is Marvin Avenue, Los Altos, California. I am head test pilot for the National Advisory Committee on Aeronautics, at Moffett Field. I have been in the flight test section of the National Advisory Committee since 1925. That's when I

(Testimony of William Henry McAvoy.)

started my flight work with them as test pilot. I have flown as a test pilot approximately 6,000 hours. To date, we have, or, rather, I have flown practically all types of Army and Navy airplanes, seaplanes, land planes, and autogiros. Practically all the work that we do in the Committee for which I have been flying for the last 15 or 17 years has been on actual flight tests.

Our particular line of work is naturally connected with the services, either doing it for the Army or the Navy. Our particular work is to calibrate, as it were, the flying qualities of an airplane for the services, find out any peculiar characteristics it might have, possibly improve on them by suggestion, if we have any, and in general what we intend to do is to try to improve the flight qualities of the service airplane.

I was employed by Mr. Zap to test a Vought-Sikorski airplane with a special wing device. I conducted this test [73] flight. The tests originally started being flown from Hughes Field in Los Angeles, and were later carried out at Daggett, and completed, finally, back at Hughes Field. I had a conversation with Mr. Zap in connection with the performance of the plane. Of course we, what you might say, conferred daily on the various difficulties or things that we were learning about the airplane, and we also discussed in particular the particular parts of the airplane which we were interested in. In my estimation there were two things on that par-

(Testimony of William Henry McAvoy.)

ticular airplane which we were endeavoring to get the particulars on. One was the flap, and the other was the spoiler type aileron. I had a conversation with Mr. Zap in connection with this flap and the spoiler aileron.

Toward the end of the test when we were endeavoring to complete the Navy requirements which apply to airplanes of that nature, I had occasion to bring up the matter of possible difficulty in getting the full performance out of the airplane. These conversations were not held at any particular time. They were carried out or discussed during the flights, daily flights. This particular instance I have in mind in which I think the subject came more to the point was during the period that we were actually carrying ut the Navy's specified tests. Now the exact date of that I would say was possibly after we had been at Daggett some six to eight days. That would place the time somewhere around the first of October. [74]

These conversations occurred usually when we were together in the small portable or mobile office which Mr. Zap had there at the time—it was a trailer which had been converted into a little engineering office—and at most times after a flight or after these particular flights when we realized that we were not able to do the complete Navy requirements on this particular ship. I couldn't say definitely who was there, but more than likely Harold Dale, and possibly one or two of the engineers.

(Testimony of William Henry McAvoy.)

Well, I can give my general interpretation of the conversation from my standpoint. I was concerned chiefly with the fact that we were having difficulty in the inverted flight condition. I had tried to slow roll the airplane and had not gotten very good results. I had also tried some snap rolls and had not gotten very good results from them, and I was concerned mainly with this particular control as applied to the airplane I was flying. I had understood from Mr. Zap that he had planned to use that on a later job that he was to do for the Navy, and in that I had tentatively been told that I might be secured to do that work, I was naturally interested in what I was getting out of the present airplane, and it was not performing as I would like to have had it do.

Prior to the time I went to Daggett Field I did have a conversation with Mr. Zap. Of course, we discussed a number [75] of things practically every day in the office while we were waiting for the weather to clear around Los Angeles.

Well, I did have one occasion to talk to Mr. Zap personally about something that he asked me to do for him. To the best of my recollection it was one or two days before we took the airplane to Daggett. It was in his office; or rather, not in his personal office; it was in the outer office, the main office. I don't recall that anyone was actually right close at hand, but it was during working hours and as far as I know the office, or, rather, the complete person-

(Testimony of William Henry McAvoy.)

nel was around and about the office at that time. But there was no one close to me and Mr. Zap at the time it occurred. No one else participated in that. It occurred, I believe, in the morning. I was sitting in the outer part of the office, the entry, as it were, reading. Mr. Zap came up to me and had a paper in his hand and said something to the effect that "Mac, will you sign this check?"

I looked up and he had this check, held before me. I took it in my hand and looked at it. It turned out to be a company check on the Zap Corporation, and it was completely blank. At the particular time it had the small stub attachment or the stub attachment that usually accompanies a business type check.

On finding there was nothing on it I sort of hesitated for a moment, and possibly made some remark offhand, and in the meantime he interrupted and said to this effect, that [76] "Well, this check is going to be used for drawing some money which will cover the general expenses of the trip to Daggett in which you and Harold Dale," and several others whom I don't remember, "are involved." And he said, "I want to get you to endorse it and I am going to have Harold Dale endorse it," and I believe he mentioned one other, but I don't remember the name; but I do definitely recall that he mentioned Harold Dale's name.

I took the check and endorsed it on the back. At that time the check was completely blank except for

(Testimony of William Henry McAvoy.)

my endorsement on the back of it. I did not subsequently receive that same check from Mr. Zap. And at the time, I might add, I did not know for what sum of money Mr. Zap was making that check out. I don't think that was even mentioned to me at the time.

I received two payments from Mr. Zap, one of $300 cash, for which I gave him a receipt; and another payment of $2,075 on his personal check, I assumed, of which at the time I received it I wrote out a hand-written receipt as having received in full payment for the test. These payments were made in accordance with the agreement I had with Mr. Zap.

(The document referred to was marked Government's Exhibit 5, for identification.)

Government's exhibit 5, for identification was shown the witness.

I have seen this before. It is my signature. This is [77] a typewritten receipt. Typewritten, for the sum of $300, which I countersigned as having received from Mr. Zap in payment for excess flight time in testing the OS2U2 airplane.

The Clerk: Government's Exhibit 5 admitted into evidence.

The Witness: I have seen this document before. It is my signature and handwriting. This is a handwriften receipt, by me, in which I state I have been paid in full for my services in flight testing the Navy OS2U2 airplane.

(Testimony of William Henry McAvoy.)

Miss Arbuthnot: I offer it in evidence as Government's Exhibit next in order.

Mr. Lavine: No objection.

The Court: Any amount stated there?

Q. By Miss Arbuthnot: Is any amount stated?

A. No amount stated.

The Clerk: Government's Exhibit 6 in evidence.

(The document referred to was marked Government's Exhibit 6 and was received in evidence.)

The Clerk: That is dated October 11, 1942, your Honor.

Miss Arbuthnot: I would like the record to show that I am now reading Government's Exhibits 5 and 6 to the jury. Government's Exhibit 5, on the letterhead of E. F. Zap Aeronautical Engineers, dated October 6, 1942.

"Received of Edward F. Zap the sum of Three hundred ($300) dollars for excess time in flight testing the OS2U airplane at Daggett Field to October 6, 1942."

Signed "William H. McAvoy." [78]

Government's Exhibit No. 6, also on the letterhead of E. F. Zap Aeronautical Engineers, in the handwriting of Mr. McAvoy, dated October 11, 1942, Los Angeles, California.

"E. F. Zap Corporation

I herewith acknowledge final payment in full covering my services in flight testing the Navy

(Testimony of William Henry McAvoy.)

OS2U airplane on Navy contract No. 83142." Signed "William H. McAvoy."

I did not receive any payments in addition to the payments evidenced by these receipts from Mr. Zap or from anyone else in connection with this flight test. To the best of my recollection I have not received anything else but these two.

Cross Examination

By Mr. Lavine:

The first flight test arrangements that I made, I made on the telephone with Mr. Zap, by long distance 'phone.

Mr. Lavine: By the way, your Honor, we are taking this a little bit out of order. I would like to read to the jury at this time from one of the exhibits presented by the Government yesterday: contract 83142; just one sentence out of the contract at this time.

Mr. Lavine (Reading):

"Subject: Contract 83142. Flight test on OS2U1 airplane, Zap folding wing version. Quotations on: (reference A.) Specification SR 38-C. Enclosure A Zap Report No. 135, [79] proposed preliminary flight test demonstration schedule.

1. Since no provisions for preliminary flight test demonstrations were included in subject contract and since the project is entering the final stages of completion, the contractor has

(Testimony of William Henry McAvoy.)

taken the liberty to investigate the possibilities of conducting the flight test on the subject airplane and respectfully submits herewith a quotation covering the cost breakdown based upon the program outlined in enclosure A.

A. Chief test pilot's fee and insurance, $4,000."

The Witness Continues: I was insured at all times during this flight. If I may refer back to a previous job with Mr. Zap the year before I carried that insurance myself, and paid for it. This particular time, it amounted to considerably more, and Mr. Zap kindly said that he would take care of it.

All of the tests were originally planned to be run at Hughes Field, if that is the place you are speaking of, and due to the weather we could not proceed and we had to change our location. We started the flight tests at Hughes Field, and included in my arrangements with Mr. Zap, and as a customary procedure, I was to be paid my traveling expenses down here. And Mr. Zap took care of those, that is right. I was also to be paid my expenses back — all additional expenses involved. [80]

My home is in Los Altos, and my place of business at Moffett Field. I came by airplane. I think in every instance that I came down I flew down, and flew back. And in addition to my expenses for the trip, the pilot's fees also include all living expenses while here. Mr. Zap took care of all those.

(Testimony of William Henry McAvoy.)

That was over and above the $2,000 which I originally planned on—originally stated in my contract with him. That was not included in any check that I received. In other words, Mr. Zap paid those additionally to anything that I received myself. No itemized statement that I know of has ever been made on that, as far as I am concerned; but they were all taken care of. In addition to the pilot's fee, the one pilot's fee, I was supposed to have a co-pilot, somebody who was to assist on that occasion. I never had much to do with that. There was a more or less tentative arrangement, as far as I was concerned, in which Mr. Zap's chief engineer, Mr. Harold Dale, would fly with me whenever necessary to take data. There wasn't a tentative arrangement for someone else to go on the trip that I know of. That might have been Mr. Zap's plan, I don't know, but to the best of my recollection Mr. Dale was the only one that I had any connection with until Mr. Zap actually flew with me himself.

After I flew at Hughes Field a heavy fog came up and the conditions here were quite foggy, and so I had to go to Daggett, which is about a hundred miles away. It is at least [81] that, if not further than that. I went up there and all my expenses up there were taken care of. In addition to my expenses up there, my expenses going to Daggett were taken care of. I flew in the Navy Airplane.

Mr. L. Clousing was originally brought into this entirely aside from my business arrangement with

(Testimony of William Henry McAvoy.)

the flying of this airplane. My understanding of that is this. Now this may not check entirely with Mr. Zap, because he was perfectly free to make other arrangement with Mr. Clousing. I had said as far as I was concerned I was willing to have Mr. Clousing come down and fly the airplane while I was flying it. If he had done that more than likely he would have been paid for it. I am not sure, but I would assume that to be the case. It so worked out that Mr. Clousing did not come down, quite a bit to his disappointment, because I am in direct contact with him, and the reason for that was, in my estimation, due to the time that it took to do our work and the requirements of trying to get the ship back into the Navy.

It is perfectly possible that if our flights had not taken so long that Mr. Clousing would have come down and flown the airplane, but as far as I am concerned I had nothing to do with that. That didn't come out of my business agreement at all. I went up to Daggett to test this plane. I think the testing ran on the order of probably 10 to 15 days, referring to my flight log here. [82]

We flew to Daggett on September 25th, and returned on the 4th or 5th of October. We were there about ten days, according to this. I made at least two to five flights a day. Some days we made more. After I made the flights and during the time I was making the flights I was consulting with and discussing the various problems with Mr. Zap and Mr. Dale.

(Testimony of William Henry McAvoy.)

These flight tests take hazards. They are on new problems in aeronautics. When you are dealing with any new airplane and particularly on a chain of flight tests, you take a certain amount of hazard. Mr. Zap made 16 flights with me while we were at Daggett. During these flights the discussions back and forth, (during the flight itself), were not very satisfactory. Our voice control was not so good on that particular setup. Usually after we came down, I and Mr. Zap and Mr. Dale would get into a big huddle, and discuss all the problems in connection with the flight, usually pertaining to that particular flight; because, I might mention, when you are flight testing an airplane you only change one thing at a time, because if you change two things, then you don't get the dual effect of that particular thing you are interested in. So each flight we usually made making some change in the flight control, and then the results of that would be discussed upon returning to the ground.

Mr. Zap, in any event, was very busy, and so was I all the time we were up there.

Of course, I was just the pilot on the airplane and [83] trying to get the results out of it. Mr. Zap was the engineering head of it. I lent very little engineering to it, I might say. He and Mr. Dale were doing that. It is true that they were quite busy all the time trying to work out the engineering problems out there. All my expenses while I was actually

(Testimony of William Henry McAvoy.)

at Daggett were all taken care of by Mr. Zap. That included my hotel expenses and everything else.

Q. By Mr. Lavine: Mr. McAvoy, these checks that you received from Mr. Zap were paid to you right up there in the field, weren't they, if you recall? A. What checks are you speaking of?

Q. The checks for your services.

A. I only received one.

Q. You only received one?

A. That is right.

Q. And how much was that for?

A. $2,075.

Q. I ask you to look at this check for $200, dated October 4, 1942. Did you receive that one?

A. That's got my signature on it. Apparently I did.

Q. So that in addition to the other check, you received, on October 4, 1942, $200?

A. That is right. That is my signature.

Q. And that check is a personal check on the Bank of America, signed "Edward F. Zap," is it not? A. Yes, sir. [84]

Mr. Lavine: I offer this check as Defendants' next in order.

The Clerk: That will be Defendants' D, into evidence; or, rather, Defendants' C.

(The check referred to was marked as Defendants' Exhibit C, and was received in evidence.)

(Testimony of William Henry McAvoy.)

The Witness: May I ask what was the date of that?

Mr. Lavine: October 4, 1942. It is about the time you finished your flights, wasn't it? The 4th or 5th of October.

The Witness: Yes, sir.

The Court: He returned October 4th.

The Witness: Yes, sir.

The Court. Now, that is two items, and then there was another item you received, wasn't there, from Mr. Zap in cash?

The Witness: Well, my statements to date have been concerned with two items. I stated that the first sum, which was $300, was a cash payment. And the other was $2,075, by check, and in this particular instance $200. That is $200, and that was by check. I do not remember any other amounts, but I acknowledge my signature. Yes, sir, that is my signature.

The Court: Endorsement, rather. All right.

The Witness: I remember motion pictures being taken of the flights while they were being made. My log does not show the [85] distance between here and Daggett. The same is given of the flight. "Takeoff at 3:50. Landing at 5:28." We went a very roundabout flight. That is a total time of an hour and 30 minutes. If that flight had been made direct we would probably have made it in about an hour and ten minutes. That would make it pretty close to 160 miles. The day I went, Mr. Dale went

(Testimony of William Henry McAvoy.)

with me that day. In the early part of the flights Mr. Zap was taking motion pictures of the flight, or having them taken. And then afterwards, as the flight tests proceeded from day to day, Mr. Zap joined me in the flights and went up; and a log is made of each of those flights here. Up to October 8th, 9th and 10th this is a correct log. It satisfies me that it would be a fairly good log of the entire procedure. I have reason to want to keep this, or get this back, because that was drawn from the files of the N.A.C.A. to bring down here. We are using that in further work on the airplane.

Q. By Mr. Lavine: Mr. McAvoy, will you kindly look at this document of the flight log of that trip and examine it and see if it is a true and correct copy of the experiences you had there, adding to your report various engineering data?

A. No. Now, this isn't the same page.

Q. Well, "The airplane was made realy." This is page 1-A. "The airplane was made ready——"

A. "6:20."

Q. "6:20 p. m." [86]

A. Apparently these are different copies.

Mr. Lavine. Well, the only thing I wanted you to do was identify this document as substantially representing the log of your various trips up there, so that I can introduce that in evidence on behalf of the defendant; and if that represents it, it doesn't have to compare with yours, if that is a true and accurate representation of the flight.

(Testimony of William Henry McAvoy.)

A. This shows a total of 54 flights, which checks with mine. I have 54 flights in mine. Apparently the location was the same for each of the flights corresponding.

The Clerk: Defendants' Exhibit D.

(The parts of the document referred to were marked Defendants' Exhibit D, and received in evidence.)

The Witness: This is a photograph of the plane that I flew. This is another photograph of the right rear of the plane that I flew in flight tests. (Identifying photograph.)

That is a picture of the same ship with the wings folded. (Identifying photograph.)

This is a picture of the same ship, the rear left, with the wings folded. (Identifying photograph.)

That is a picture of the same ship with the ailerons extended. (Identifying photograph.)

That is a picture of the three-quarter front right with the flap fully extended. (Identifying photograph.)

That is another picture of the ship, with the quarter left front, left flap extended. (Identifying photograph.) [87]

That is a copy of the spin chute installation of the ship. (Identifying photograph.)

That is a picture of a ship with the flap extended out landing or taking off.

That is a picture of a ship with the tail strike wheels striking the ground.

(Testimony of William Henry McAvoy.)

The Clerk: Defendants' Exhibit E in evidence.

(The pictures referred to were marked as Defendants' Exhibit E, and were received in evidence.)

The Witness: The object of this flap is to slow down the airplane in landing and taking off, and that flap is in the wing and then it extends out from the wing as you fly. In this particular instance it did.

This document of October 11th, this is all written in my own handwriting. I wrote the entire document, October 11th, Los Angeles, California. "I herewith acknowledge final payment in full in connection with my services in flight test as to Navy OS2 airplane on Navy contract No. 83412," and I scratched that out and wrote 83142—William H. McAvoy.

In connection with that flight test which was to be conducted with that plane, there was some additional test made on the 8th, 9th and 10. I mention the 8th, 9th and 10th, they may not be the exact dates, but to the best of my recollection I came back and made several flights, either the following week end or several days after that, about [88] that particular date. I made another trip back from the northern part of the state, and my expenses coming back here and going back were all taken care of by Mr. Zap. And my expenses while I was here during the 8th, 9th and 10th, were taken care

(Testimony of William Henry McAvoy.)

of by Mr. Zap. I am not sure I was here that long, but while I was here, they were covered.

I don't remember that Mr. Zap flew with me on the 8th, 9th or 10th, but he was there at the field while we were making the flights; he may have gone with me, but I don't remember. After I got through with those tests, and the tests were made, Mr. Zap was there, checking the engineering data. I presume he was pretty busy working, mainly in regards to the ship, or the enginering, or consulting with the men as to what was to be done next. I was not with him every minute, you understand. After a flight I would usually relax a little bit or go around and get a drink, or something like that. Sometimes I would be with him when they called me, and other times I would just step aside, as it were. Everybody seemed quite busy around there at the time, including myself. There was quite a bit of work.

Now, after the last test that I made the plane was flown to Anacosta by a Navy pilot, so far as I know. And incidentally during these periods of time I was discussing the flight tests and the matter of arranging for the test, and Mr. Zap went up to see me once with his engineer, in Oakland. He came up in relation to this particular series [89] of tests at least once, if not twice, to my home town, and in one instance, stayed with me overnight. Mr. Dale was with him on one visit.

I don't recall exact circumstances or who was around when I received the $200 check. In fact, I

(Testimony of William Henry McAvoy.)

am trying to check up on that in my mind. I cannot quite trail it back. On October 4th we just had gotten back from Daggett I believe—10-4—I think that then, that particular day, we were flying out to Hughes Field, as far as I can check here. My record here shows we returned from Daggett Field to Hughes Airport on the 4th of October, which was apparently the date that check was given.

The Court: The date evidently is approximately correct on this exhibit, Mr. Lavine, on the $200 check, because I notice there is one banking endorsement of October 7th, which was three days after; there is another bank endorsement, which is poorly stamped by the bank, and it is impossible to make it out.

By the Witness: Inspector Hartman, a naval inspector, was at Daggett the entire time.

Mr. Lavine: That is all. Thank you.

Cross Examination

By Mr. Balter:

Miss Arbuthnot: We would like to ask the Court's permission to reopen and ask a few direct questions.

The Court: Granted. [90]

Direct Examination
(Resumed)

By Miss Arbuthnot:

Q. Mr. McAvoy, I show you Government's Exhibit 7 for identification. Have you seen this before? A. Yes, I have.

(Testimony of William Henry McAvoy.)

Q. Is this your signature?

A. That is my signature.

Q. Thank you. Will you tell us whether this check is the one you endorsed at the time you had the conversation with Mr. Zap, concerning the——

A. That is the check which I described before which Mr. Zap brought to me blank, and which he had me endorse on the back with my name.

Miss Arbuthnot: The Government offers this in evidence as the Government's next exhibit in order.

The Court: Received in evidence.

(The check heretofore marked for identification as Government's Exhibit No. 7, was received in evidence.)

The Clerk: Government's Exhibit 7 admitted into evidence.

Miss Arbuthnot: Now, I would like the record to show that the Government's Exhibit 7 is being passed to the jury for examination.

(Government Exhibit 7 shown to and examined by the jury.)

Miss Arbuthnot: That is all. [91]

Cross Examination

By Mr. Lavine:

I was not present when any of the typing was done on this check. I, therefore, have no knowledge of who typed this check, or any of the amounts on there. I haven't any idea at all. I was not present when this check was signed. I only saw the check

(Testimony of William Henry McAvoy.)

once for about five minutes, and that was during the time I signed my name on the back of the blank check—no, sir; on the front of the check.

The date I signed this check—I have estimated that it was a day or two days before we went to Daggett, and that would make it around about the 23rd, or something of that order, September 23rd, when I signed it on the back. I, of course, have not the slightest knowledge of the date that this check cleared.

The Court: What is the amount of the check, Mr. Lavine?

Mr. Lavine: The check is for $4,000 made out—in the amount of $4,000, made out on the typewriter.

The Court: What date?

Mr. Lavine: Dated September 23, 1942, made out on the heading of E. F. Zap Aeronautical Engineers, No. 2679. Now, the check appears to be marked "Paid 10-13-42." In other words, there is a bank stamp of having been paid "10-13-42," and it bears a stamp on the back "Security-First National Bank of Los Angeles," and a stamped endorsement "Edward F. Zap—E. F. Zap," under the name "William H. McAvoy." [92]

The Court: Paid about 17 days after it was drawn?

Mr. Lavine: Yes, your Honor.

FRED S. EASTMAN,

called as a witness by and on behalf of the Government, having been duly sworn, was examined and testified as follows:

By Mr. Binns:

I live in Seattle, Washington; am employed by the University of Washington as Associate Professor of Aeronautical Engineering and Wind Tunnel Supervisor. As such, I control the policy of the laboratory and handle the records which go through from the billing and the job records that are done in the laboratory, maintenance of the laboratory, and that sort of thing.

My assistants are Mr. J. H. Dwinnell, and other faculty members. Mr. Dwinnell is assistant supervisor.

I know the defendant Zap; he was a customer of the University of Washington Wind Tunnel Laboratory; brought models up to the laboratory to be tested on numerous occasions.

This letter, Government's Exhibit 8 for identification, I have seen before; it is a record of the work done in the wind tunnel from the period of December, 1941, through July, 1942; it is dated August 25; addressed to E. F. Zap; E. F. Zap signed it.

(The document was admitted in evidence as Government's [93] Exhibit 8 and passed to the jury.)

The pencil notations on the margins of the document were not on it when I mailed the report.

(Testimony of Fred S. Eastman.)

The arrangements that are made to secure power for the wind tunnel are as follows:

The power is taken from the regular University supply and they have a separate line from that power supply to the wind tunnel; the University purchases all the power for its entire facilities and the wind tunnel draws from the entire University power system; there is no separate power for the wind tunnel from the power company. It has a separate line from the main section of the University. The payment for power goes through my office; that is, the charges go through my office for power used in the wind tunnel. The University comptroller's office pays for the entire power consumed by the University of Washington. When work is done at the wind tunnel for a customer, the customer is billed for the power which he used during those tests. He is billed by the Comptroller of the University and he pays the money to the Comptroller of the University.

The arrangement by which labor is performed in the wind tunnel for the customer is as follows:

The wind tunnel is run by students, partly through part time students and the part time work in the wind tunnel. These men turn in time slips, each day on which is noted the [93-a] job for which their time was spent, and those go through the office of Mr. Dwinnell. When these bills are made up, those time slips are gathered together and the bill is computed from those time slips and forwarded

(Testimony of Fred S. Eastman.)

through my office to Mr. Davis, the Comptroller's office and the bill is then rendered from the Comptroller's office to the customer. The students receive their compensation from the University of Washington; there is no authorized arrangement by which a person using the wind tunnel might pay student labor directly himself. The University has authorized the amount of work that the students performed on these tests, and an effort has been made to confine the arrangement for paying the students to be direct payment by the University. This arrangement was put into effect prior to December of 1941, and about the summertime of 1941.

This arrangement has been violated by customers; I don't know if it has been violated by Mr. Zap.

Cross Examination

By Mr. Lavine:

I believe it is probably true that Mr. Zap did violate this arrangement.

Mr. Zap used all of the time which he was allotted by the University, and as many students as he could get to work for him. These students gave him considerable time.

These periods of time which the University allotted him [93-b] ran for a period of from five to ten days; Mr. Zap was allowed the key to the place, so that he could work 24 hours a day if he wanted to. He often worked evenings; students also often worked evenings with him. Zap's employees also worked with him at the University wind tunnel.

(Testimony of Fred S. Eastman.)

Defendant's Exhibit F (later admitted into evidence) is one of our reports, based on Mr. Zap's work, dated June 16, 1942, entitled "University of Washington, Aeronautical Laboratory Report 154-B". It contains the results of the tests made by Mr. Zap in the wind tunnel at the University of Washington.

Several similar reports were compiled, namely reports 154-B, 173, 177, 178, 183, 188 and 190.

I have no way of knowing all the persons who might be present at night, or any of the things that were done, but I should be cognizant of the arrangement.

We billed Mr. Zap for power and machines but I couldn't testify as to the exact quantity. The amount billed for power and machine work appears on that bill. $12.50 "tunnel time" charge, is the charge for the use of the laboratory, laboratory equipment, laboratory maintenance and such things.

Mr. Zap has been coming to our laboratory for a matter of two or three years at least; and before he comes he makes arrangements for the use of the wind tunnel time. He has frequently been urgently in need of time and we have done [93-e] everything we could to fit things in for his time.

On March 25, 1943, a small error of $86.40 was found on the University accounts for power, out of an entire bill up in the $5,000 mark. This five thousand dollar bill was covering the entire period that is outlined in that other billing file.

(Testimony of Fred S. Eastman.)

When Mr. Zap was at the wind tunnel, it was being run to its fullest efficiency.

Power varies a great deal, depending upon the work being done. The wind tunnel will draw a tremendous amount at a very high speed and will not draw so much power at a slow speed, so it will vary from one day to another depending upon the—but the main power was being used to the tunnel's capacity by Mr. Zap.

Redirect Examination

By Mr. Binns:

The number of students required to operate the wind tunnel varies but we normally hold to approximately three students to operate the wind tunnel. We pay these students between sixty cents and one dollar per hour, depending upon the experience of the men and we practically never have three dollar men at one time. Unless it was authorized by us for special night jobs, we did not consider such night jobs part of a student's authorized thirty hours per month. [93-d]

The bills rendered include night time power also.

Q. In the letter, Government's Exhibit 8, which we have just introduced in evidence, in that letter did you identify the student labor which went on each report? A. Yes.

Q. Did you include in that any work you were cognizant of that the students had done at night.

A. Yes.

(Testimony of Fred S. Eastman.)

Recross Examination

By Mr. Lavine:

There may have been circumstances such that a lot of student work was done at night and no report was made to me; we hoped there wouldn't be much of this "black market" labor among the students; there may have been some instances of that kind. I don't know if Mr. Zap was employing some of these students and paying them privately. No record was made by us of students who might be paid privately by Mr. Zap for night work.

Referring to Exhibit 8, shop work was extra work than the work which is charged through this particular bill; the amount of the bill is $5,295.56, which shows the full amount received during that time, and the full amount that Mr. Zap owed the University for this work except a small overcharge error in the amount of $86.40.

On March 25, 1943, the Comptroller of the University [93-e] forwarded to Mr. Zap a credit memorandum to take care of that which read as follows:

"Mr. Edward Zap.

Dear Mr. Zap:

In checking over our last voucher No. 5 in the amount of $5,295.56, we discovered that a stenographic error was made in setting forth the charges in report No. 154-b. Power and tunnel machinery was billed as 4800 kilowatt hours at 2¢ per hour, $96.00. This should have

(Testimony of Fred S. Eastman.)

been billed as 480 kilowatt hours at two cents, $9.60. We are, thus reducing the total amount due the University of Washington from $5,295.56 to $5,209.16. This account is long past due and we would appreciate an immediate remittance."

Shop work would appear on the bill, and all shop work done outside the University where models were brought in for testing was not done by our University employees to our knowledge; this might have been done, however.

JAMES HERBERT DWINNELL,

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

By Mr. Binns:

I reside at 143, 3836 Northeast, Seattle, Washington. [93-f] I am employed at the University Aeronautical Laboratory. I am assistant supervisor of the aeronautical laboratory; also I am an instructor in aeronautical engineering in the University. Under Mr. Eastman I supervise wind tunnel tests, conducted there by ourselves for companies, I supervise tests made by companies, or company representatives present; I supervise tests made by ourselves for our own research program.

I am acquainted with the defendant Edward F. Zap. I met the defendant Edward F. Zap when the

(Testimony of James Herbert Dwinnell.)

wind tunnel was first started up, back in 1939. I was employed—or, rather, I was employed about six months after the wind tunnel was started up, in the capacity of computer and what-not. In other words, I was a new graduate at that time, and then I worked up to be assistant chief computer, at which time I met Mr. Zap; then later on I was made chief computer and then instructor and assistant supervisor. [93-g]

I was assistant supervisor December 1st of 1941.

Q. By Mr. Binns: Will you relate, as briefly as possible, what is meant by a wind tunnel test?

A. Well, a wind tunnel test is conducted in order to save time in determining the performance characteristics of an airplane. A model is built of the complete airplane, showing somewhere around a 1/10th scale. In other words, the linear dimensions reduced to tenths. And then that model that is, incidentally usually built of hard wood and metallic substances, is put in an air stream. This is the precise opposite of building a model like these children fly a model through the air, it is the opposite, we hold the model still and pass the air over the model, and then by electrical and mechanical means we throw the forces on that model to determine the aerodynamic characteristics of the model, from which we may predict the performance. In other words, the predicted range, endurance, rate of flight, and so forth.

A wind tunnel report is the result of a test. In

(Testimony of James Herbert Dwinnell.)

Mr. Zap's case a test made by a company—perhaps I should explain a little more fully—the forces that are measured on a model are recorded electrically on a hatch panel, that hatch panel has photographs and from those photographs we can read off the forces and the air speed, and all of the other items we are interested in concerning the model, and then that series of photographs goes into the computing room, [94] and in the computing room computations are made and curves drawn, and these curves are assembled into a report and sent to the company along with our description of the test. We don't, in general, analyze the data unless specifically asked by the company.

One report necessarily means that that report is made on one model; they do not mix models in a report. I could explain that a little more fully too—in that one model there may be several hundred changes, they may change the tail, they may put a new tail on, something like that, but basically the model is singularly for one report.

In connection with the work performed for Mr. Zap, and report No. 77, for me to tell you what type of model that report was compiled in relation to, it might be more convenient if I referred you to the drawings sent by Mr. Zap's organization and the photographs which we took of the model while it was in testing. I can show you a photograph of every model we have ever tested; for each report the outline of computations made is kept in a separate folder for our records. We have one sheet on

(Testimony of James Herbert Dwinnell.)

each and a complete record of all tests is made, and the computation on that sheet is sent to the company, and then all the drawings received from the companies are kept in this folder. The actual computations are usually somewhere else; not kept in a folder like this.

I can show you a photograph of every model we have [95] ever made. I can tell what model was used in Report 177. I have several photos. I have one drawing of the wind.

(Proceedings were here had without the hearing of the jury as follows):

Mr. Lavine: Of course, these papers and documents are hearsay unless the Government intends and does assure the Court they are going to connect them up in some manner with the defendant Zap and that he has knowledge of them. These are reports at the University of Washington, made by the University of Washington.

(Further proceedings were resumed within the hearing of the jury as follows):

Mr. Binns: I ask this group of photographs, held together with the rubber band and the yellow slip of paper, saying "Report 177," 1 to 10, be marked as the Government's Exhibit next in order.

The Clerk: Government's Exhibit 9 for identification.

(The documents referred to were marked as Government's Exhibit No. 9, for identification.)

Mr. Binns: I show you some photographs

(Testimony of James Herbert Dwinnell.)

marked Government's Exhibit 9 for identification, and ask you what this is a picture of?

Mr. Lavine: Objected to as irrelevant, immaterial and incompetent; no proper foundation laid.

The Court: Overruled. [96].

Mr. Lavine: Exception.

The Witness: They are a picture of one of the airplane models expressed by Mr. E. F. Zap. I can only refer to the company since, as I recall, Mr. Zap was not present; he sent one of his representatives. Mr. McLauchlin came with the model. Usually in testing, some representative of the company comes, and in this case I am fairly certain Mr. McLauchlin was present at the test, although I don't recall whether Mr. Zap was. The model shown [96-a] in these photographs was sent to the University from E. F. Zap, Aeronautical Engineers.

Mr. Binns: I ask that that be admitted in evidence at this time.

Mr. Lavine: To which we object, no proper foundation laid as yet. Mr. Zap is not bound by this witness' statement as to some—what this witness says was received from somebody in the organization.

The Witness: Unfortunately we didn't ever make a report to Mr. Zap on this model. I don't know if it is necessary to explain——

Mr. Lavine: No, it is not.

The Witness: All of the data compiled from the wind tunnel tests of this model we gave to Mr. McLauchlin. I have other drawings that Mr. McLauch-

(Testimony of James Herbert Dwinnell.)

lin used during these experiments—not previously, but subsequently. Mr. Zap was present at least on one occasion with Mr. McLauchlin, and discussing the models or the work, they both came together.

The Court: In evidence.

Mr. Lavine: Exception.

The Clerk: Government's Exhibit 9 in evidence.

(The documents heretofore marked for identification as Government's Exhibit No. 9, were received in evidence.)

Mr. Binns: May I have this sheet of paper bearing the [97] stamp "Confidential," and a pencil drawing of an airplane wing, be marked Government's next exhibit in order?

The Clerk: Government's Exhibit 10 for identification.

Mr. Binns: While we are waiting may I have these three sheets entitled—pardon me—four sheets, entitled, "WUAL-Dwinnell Log—Zap Project 15," marked as the Government's next exhibit in order?

(The documents referred to were marked as Government's Exhibit No. 11, for identification.)

Mr. Binns: May I have this one sheet of paper, which is a drawing of an airplane, marked in the upper right hand corner "AWAL-Rap. 177,"——

The Witness: Excuse me, that would be "UWAL."

(The document referred to was marked as Government's Exhibit No. 12, for identification.)

(Testimony of James Herbert Dwinnell.)

Q. By Mr. Binns: Mr. Dwinnell, I show you this paper marked Government's Exhibit 10 for identification and I will ask you if you have seen it before?

A. Yes—in the aeronautical laboratory. I cannot guarantee where I got it, because it might very well have been given to one of my assistants. I don't think that was handed directly to me. However, down at the bottom there is "E. F. Zap." I cannot testify from where that document came into the possession of the University.

Mr. Binns: We offer that in evidence, your Honor, upon the basis of the printed legend in the lower right hand corner. [98]

The Court: As I understand it, no report was ever made to Mr. Zap with reference to the design that is on this exhibit, Government's 10 for identification.

The Witness: That was because of the lack of student help at the University, we allowed Mr. McLauchlin, Mr. Zap's representative, to take all the data. By data, I mean data connected with the test. This has nothing to do with the compilation of data. This is merely for our records to show us how large the model was, and its description. I am willing to swear these dimensions here check with the dimensions I made personally. As far as the external appearance of the wing is concerned,——

This model—Report 177—in connection with this Exhibit 10 for identification; this is a drawing of only one part of the airplane. We turned over all

(Testimony of James Herbert Dwinnell.)

data concerned with that airplane to Mr. McLauchlin. This instrument I hold in my hand is a diagram of a part of an airplane. I've started to make some computations from that, the work on that, then when we found we didn't have sufficient help and Mr. Zap was in a great hurry to get the report over with in a hurry, we had to explain to Mr. McLauchlin that we couldn't do it. To—pardon me—I may have made a misstatement—Mr. McLauchlin, who said he was in a great hurry, so we explained to him we could not supply the student help to get the data out in time, and then we turned over all the data to Mr. McLauchlin and retained parts of it here in the labor- [99] atory.

The Court. Admitted in evidence.

(The document heretofore marked for identification as Government's Exhibit 10, was received in evidence.)

Mr. Lavine: Exception.

Q. By Mr. Binns: I will show you this line drawing, Government's Exhibit 12, and ask if that is a line drawing of the model plane tested in Report 177.

A. I cannot tell where that came into the possession of the University of Washington. No more so than the other one. That is a side view of the complete airplane. It is the same airplane.

The Court: All right. In evidence.

(The document heretofore marked for identification as Government's Exhibit 12, was received in evidence.)

(Testimony of James Herbert Dwinnell.)

Mr. Lavine: Objection and exception.

The Court: Exceptions are noted.

The Clerk: Government's Exhibit 12 in evidence.

Q. By Mr. Binns: I show you these four documents, marked Government's Exhibit 11 for identification, and ask you what they are.

A. This is a record of the tests made in our laboratory on Report 177, and this probably cannot be read by anybody but our own staff with very much intelligence. We furnished a copy of that report to Mr. McLauchlin. This is primarily [100] for our use, and he requested we give him a copy of it.

Q. By Mr. Binns: So you gave him a copy of it? A. That is correct.

Mr. Binns: We offer this in evidence at this time, your Honor.

The Court: Received.

(The document heretofore marked for identification as Government's Exhibit 11, was received in evidence.)

Mr. Lavine: The same objection and exception, no proper foundation laid.

Mr. Binns: There is printed across the top of this: "Zap Project 15."

The Witness: I cannot tell from whom I received the information upon which I got that printed legend.

Q. Now, then, Mr. Dwinnell, calling my attention to Report No. 178, I have a photo of the model used in that report?

(Testimony of James Herbert Dwinnell.)

A. There are more photos here of 177, and more of 178. Probably a student put this thing together.

Q. By Mr. Binns: Mr. Dwinnell, I show you a group of photos marked Government's Exhibit 15, for identification.

A. I have seen those before. They are photos of the model tested in report 178. I might explain that we didn't furnish any complete reports, including and after report 177. I furnished the data compiled to the Zap Aeronautical Engineers. We furnished the data as it was taken from the [101] wind tunnel. The person to whom we furnished the data in this particular instance was Mr. McLauchlin. Mr. Zap was not in Seattle in connection with report 178—not to my knowledge.

I have only what is called the U. W. A. L. tunnel log. Report 189 and 190 are mixed up in there. Report 189 and 190 are Government's Exhibit 14, for identification.

I am familiar with the model used in compiling report No. 183. I am familiar with the report used in compiling report No. 188.

The Court: You may inquire, Mr. Lavine.

Q. By Mr. Lavine: You weren't present during the work on the model 177, were you? Were you present?

A. Yes, I was. I was not present for the whole time, but I was supervising it and conferring with Mr. McLauchlin, and I saw the models myself. As a matter of fact, I made some check of the dimensions, to make sure that the drawings sent to us were correct.

(Testimony of James Herbert Dwinnell.)

Q. Were you present during the time that——

Mr. Lavine: What was the other number?

Mr. Binns: 183.

Q. By Mr. Lavine: (Continuing)——183 were being made? A. Yes.

Q. And 188? A. Yes.

The Court: Objection overruled. Proceed. [102]

Mr. Lavine: Yes. I was just looking at this, your Honor. That is all.

Q. By Mr. Binns: The same model was not used in the compiling of report 177 that was used in compiling 183?

A. No, it wasn't. To my knowledge they were entirely different airplanes. The model used in report 183 and the model used in report 189, were the same airplanes.

Pardon me—I said 183 and 189. Reports 183 and 189 were on different airplanes.

Q. How about report 183 and 188?

A. Do you mind if I refer to my records? They may not have been the same wing, but they are for the same airplane. I am familiar with the model used in 178. That was not the same model which was used in report 183.

Mr. Lavine: Just a minute. I don't understand this witness to state that there were airplanes up there, but certain tests being made of certain models.

Mr. Binns: I will rephrase that question, your Honor.

Q. By Mr. Binns: The type of airplane a model of which was used in report 178, was not the same

(Testimony of James Herbert Dwinnell.)

type of airplane a model of which was used in report 183? A. They weren't the same.

Q. I show you a group of pictures marked Government's Exhibit 14 for identification, and ask you, have you seen those pictures before?

A. Yes, I have. They are both pictures of a wing [103] configuration alone. In other words, no tail or tail booms are on this particular model.

That model was not used in compiling any data for Mr. Zap. It was used in collecting data which resulted in reports 189 and 190. I couldn't tell that the same wing was used in compiling both of those.

(Government's Exhibit 14 was received in evidence.)

I have photos of the model used in compiling the data for report 183. Those are photos of the model used in compiling report 183.

(Government's Exhibit 15 for identification was shown to the witness who stated):

Those are the photos of the model used in compiling report 183.

(Government's Exhibit 15 was then admitted into evidence.)

I never did meet Mr. Zap personally—only in connection with wind tunnel tests at the University of Washington laboratory aeronautical laboratory. I had a conversation with him in regard to letterheads of the University of Washington. It must have taken place after the test was run in the University of Washington in laboratory designated as report

(Testimony of James Herbert Dwinnell.)

178. It was a conversation between Mr. Zap and myself.

(The following proceedings were had out of the hearing of the jury):

Mr. Lavine: I don't know what the Government proposes [104] here, but we want to object to any conversations with Mr. Zap at this time as incompetent, irrelevant and immaterial, no corpus delicti established, and you cannot establish that by conversation with this witness. For that reason I object unless the Government states what its purpose is, and it is shown to have some relevancy.

The Court: Objection overruled.

Mr. Lavine: Exception.

The Witness: Prior to this conversation Mr. Zap had run a test in our laboratory designated as report 173. After [104-a] the test was run it was found, or I found out that that report should be split in two parts; one part was supposed to be Mr. Zap's private research, and the other was to be a report sent to the Navy. Now in splitting that report we found great difficulty in allocating the charges for power and for student labor. We found it, as a matter of fact, impossible to separate those two reports; so that I asked Mr. Zap how he wanted the reports split, if there was any way we could help him so that he could arrive at a reasonable estimation of how much to charge the Navy and how much to charge to himself, and he said the best way for us to do was just to give him a blanket charge for the whole report and then he would seg-

(Testimony of James Herbert Dwinnell.)

regate it himself. And it was at that time that he suggested that we give him some of our correspondence paper, with our letterhead on it, University of Washington Aeronautical Engineering Department, so that he could use it, I assumed.

The Court: No, no, not what you assumed at all. Just the conversation.

Q. By Mr. Binns: Did you give him the letterheads?

A. He requested that we give him the letterheads so that he could take care of the bills. I did not give him the letterheads.

With reference to our report 173—we divided it and made it into report 173 and report 154-A. Report 173 covered the private project of Mr. Zap.

[105]

Mr. Lavine: Just a minute. Object to that as calling for a conclusion of the witness. The witness doesn't know what the private project was. He so testified. He couldn't segregate them. We couldn't segregate——

The Court: Yes, you said you couldn't segregate them: you couldn't separate them.

The Witness: That is what I intended to explain.

Mr. Lavine: Just a minute.

The Court: Just a moment. Did you make two reports to Mr. Zap?

The Witness: Yes, we did.

The Court: Did you discuss how they should be made with Mr. Zap?

The Witness: Yes, we did.

(Testimony of James Herbert Dwinnell.)

The Court: All right. Tell us then the conversation you had with Mr. Zap about making two reports.

The Witness: He told us how—or, rather, Mr. McLauchlin told us how to separate the reports.

By Mr. Binns:

Q. Now, Mr. Dwinnell, during the conversations with Mr. Zap in regard to the dividing of this report, did he tell you that there was certain private work of his own in there?

A. Yes, he did. At the time the report was written—rather at the time the report was run, I went out and had conversations with him to find out how he wanted the report [106] written, that is our customary procedure, and at that time he told me that either he or Mr. McLauchlin would tell me how to split the report; so that subsequently Mr. McLauchlin showed me how to do it.

Q. By Mr. Binns: Did Mr. Zap tell you that it would be necessary to split the report?

A. Yes.

Q. Did he tell you that some of the work that you had done had been done on private experiments of his own?

A. Yes. When the tunnel is in operation, not more than eighteen students are actively working on it at one time. Usually there are considerably less than that; they come in and work when they have no great periods, so it varies. At five o'clock in the afternoon of a certain day, there would be

(Testimony of James Herbert Dwinnell.)

a maximum of 18 students possibly working on the wind tunnel at the same time; we would be paying salary to 18 students then; on the other hand at sometimes there may be only five.

Q. I cannot select a day in your mind when the University of Washington was working on report 178; can you tell us the day and how many students were working?

A. There were a total of nine students working on report 178. All nine of these students would not work the same hours each day; they would come in and replace each other. It is hard to tell how many hours each student would [106-a] work. Some work a full day, and then don't work for a day, and then don't work for a day and then come in for half a day. I cannot tell on the first day of that report how many students were working.

The Court: Let me interrupt a moment. The Government exhibit which I have in my hand shows, under report 178, labor, 52 hours.

Cross Examination

By Mr. Lavine:

Q. Prof. Dwinnell, on what project was report 178 being performed?

A. I am sorry. You will have to give me the tunnel log of report 178. Project 15, according to our records.

Mr. Binns: 178?

The Witness: Yes.

Q. By Mr. Lavine: According to your records.

(Testimony of James Herbert Dwinnell.)

You have no knowledge of your own, of your own memory, now, of what project that was on?

A. You asked me the project number. It was No. 15.

Q. No, I asked you if you had an independent knowledge of what plane that was on.

A. My conversations with Mr. McLauchlan—let me make it another way. Mr. McLauchlan told me that the airplane tested in report 178 was specifically designed for long range and for high performance characteristics in that type of work [107] for a long range and carrying heavy loads.

Mr. Lavine: He has marked it Exhibit No. 15.

Q. By Mr. Lavine: Will you tell me what type of plane these were on? I am just asking you from the pictures now. You have identified the picture here. Can you tell us what those pictures are?

A. I know they are on the Gruman, but I can't remember whether it is F4F or F4F3, or just precisely what it was. You understand there are an awful lot of configurations tested on an airplane. That might be an aileron or a spoiler; I couldn't tell you. From the picture, I can't tell what it is, an aileron or a spoiler. It might be an aileron or a spoiler. That is a flap on the wing. That picture is an upstream view showing the flap configuration.

Q. As far as these photographs are concerned, you couldn't tell on what particular type of plane or what particular types of planes these particular flaps could be used on, is that correct?

(Testimony of James Herbert Dwinnell.)

A. No, a flap can be used on any kind of airplane. An aileron can be used on any type of airplane. This work that Mr. Zap was doing was exclusively on flaps and ailerons.

Q. Now referring to report 177 here—Government's Exhibit No. 12.

A. That is a flap. Wait a minute, just one moment. I am sorry. That is an aileron, referred specifically to by the Zap organization as a "rolleron."

[108]

This is an auxiliary control out in front of the wing. I have never heard of any specific name applied to it. (The witness then identified various photographs as flaps and ailerons.)

A Grumman is a Navy fighting plane. Mr. Zap was experimenting on different types of Government airplanes up there.

Mr. Lavine: Referring to Exhibit 9 now:—

A. That is just an airplane tested by Mr. Zap. I know very little about it except from my conversations with Mr. McLauchlan. There are flaps and—I am sorry. These photographs are so small that I can't tell whether there are ailerons on there, but there are flaps. There are flaps on these photographs in Exhibit 9.

Now referring to Government's Exhibit 13—I don't see any flap configurations, but there are aileron or spoiler configurations on the wing. That was described to me as a cargo-carrying plane; a cargo or a long range airplane. And in connection

(Testimony of James Herbert Dwinnell.)

with that description I personally have no knowledge about it. As far as these particular types of flaps or ailerons and spoilers—it is quite possible they would fit on any airplane, any type of airplane.

Exhibit 14—a picture of a wind model tested by Mr. Zap. It is a rather peculiar type of tip aileron here which, if I hadn't been told that it was an aileron I might have wondered what it was; and then there is another device on here which is a fluttering trailing edge; and that is about [109] all I can say about it. They could be applicable to any type of plane. You understand when I say any type of plane, I don't mean a little thing like a Taylor Cub, or something. You design a plane for a specific purpose. They could use these things for varying purposes.

Well, you design a particular piece of equipment to fit a particular airplane. If it doesn't need that equipment, there is no sense in going to all the work in designing it. However, it would be conceivable that the equipment designed by Mr. Zap and tested in our wind tunnel might be for the Grumman; I will admit that.

Q. Thank you. Do you have some other photographs here? I notice you have some other pictures which have not been introduced.

A. These have not been introduced. They were given back to me for some reason. These are tests of a two-dimensional wing—two-dimensional flow study on a wing. That is in connection with the

(Testimony of James Herbert Dwinnell.)

flap work. I couldn't tell you whether they are on the Grumman and other fighter planes of the United States Navy, or just a general study. The notation is not in my handwriting. I do not know what report these pictures were taken in connection with, independently, because report 154, 154-A, 154-B and 173 were all run on the same basic wing. I might be able to. May I see those?

Q. Yes.

A. These are report 154, and these must be connected [110] with report 173, 154-A or 154-B.

(The photographs referred to were marked Defendants' Exhibit G, and received in evidence.)

These pictures were the original report 154 and represent a two-dimensional flow study on a wing section. These are photographs of aileron and flap configurations on that particular two-dimensional flow study. Those will fit on the Grumman and United States Navy fighting planes. They could be so designed.

(The photographs referred to were marked Defendants' Exhibit H, and received in evidence.)

Q. By Mr. Lavine: Now I ask you to look at these pictures and say what they represent. What do those pictures represent?

A. Droppable gas tanks on the wing. I cannot tell whether that is a release for a bomb, without

(Testimony of James Herbert Dwinnell.)

referring to further records—and these tanks, I cannot tell what plane these were designed for. I just know that they were on that particular wing.

Q. By Mr. Lavine:

I recognize the photographs, but the only thing I don't recognize is the bomb, and the other article on there. I recognize this as one of Mr. Zap's tests made in connection with report 183 or 188. I recognize each and all of these photographs as in conjunction with one or the other of these two reports.

[111]

(The photographs referred to were marked Defendants' Exhibit I, and received in evidence.)

Q. By Mr. Lavine: I ask you to examine these photographs and see if you recognize those and what they represent.

A. They are tests on a wing made by Mr. Zap's organization.

Mr. Lavine: I offer these as defendants' next in order.

The Court: They will be received.

The Clerk: Defendants' Exhibit J, into evidence.

(The photographs referred to were marked Defendants' Exhibit J, and received in evidence.)

The Witness: Our University is known as having one of the leading if not the leading wind tunnel test equipment in the country. It is correct that

(Testimony of James Herbert Dwinnell.)

we do considerable work in connection with Government projects. Mr. Zap requested time in the wind tunnel, and we, when I say "we" I mean Mr. Eastman made all arrangements for his time in the tunnel. It didn't include 24 hours a day; it is a fact that Mr. Zap had a key to the wind tunnel; but we weren't testing 24 hours a day, but he was permitted to work in there at all hours of the day and night, so that Mr. Zap could go into the wind tunnel during the night, remain there as long as he wished, and work out his experiments and his problems to his heart's content, provided he didn't try to operate the tunnel. After he first came up there, during the earlier part of his experimentations up there [112] in the wind tunnel, I had an argument with him; not on his first visits; I did have some argument with him at one time over employing students at odd hours. No, I didn't tell Mr. Zap that it was against the rules of the University because the University didn't want the students working nights, which might interfere with their studies in the day; there are no restrictions about working at night. The argument was about just that we watch; the faculty, that is, of the University, watches the number of hours that students put in in outside work, and compare that with the number of hours that they are taking as a load in the University, and allocate a certain number of hours they are supposed to work in the wind tunnel, and they have to get special permission from us in order to work overtime.

(Testimony of James Herbert Dwinnell.)

The Court: Did you see them work, or did you know they were working down there?

The Witness: Well, if they work overtime we can't stop them. It is merely our suggestion that they don't work overtime.

Mr. Lavine: That is what I want to know.

The Witness: I didn't keep personal track of whether work was done on 183 or 188 or 178 personally; I really have no way of telling, of my own knowledge, just what amount of work was done on report 154-B or 178 or 189 or 183—not without referring to the records. Mr. McLauchlan did not necessarily discuss all of the various reports that he [113] was working on. He discussed it in general terms, but he didn't tell me what particular performance they expected to get out of the airplane. He just explained in general terms what some of the models were being designed for. 15 wind tunnel tests were conducted up there, pertaining to Mr. Zap, counting one report which was a supplementary report, which was not backed up with experimentation. In other words, it was a survey of another report, an estimate of performance and what-not. Mr. Zap was up there working day and night when he was up there; he was not always present. I couldn't guarantee that when he was present he was working day and night. I wasn't there day and night to watch him.

The Court: I notice in Government's Exhibit 8, for instance, under each report, taking any one of

(Testimony of James Herbert Dwinnell.)

them—say report 175, "Labor, 940 hours." Does that include student labor?

The Witness: That's entirely student labor.

The Court: And that is true of all of these items, is it?

The Witness: That is correct.

The Court: Where it says "Labor."

The Witness: Yes. My charge is absorbed in the supervision. As far as I know, the University has not received reimbursement on that particular bill. [114]

Redirect Examination

By Mr. Binns:

Mr. Zap had a key to the wind tunnel. He couldn't operate the tunnel at all. It's impossible to operate the wind tunnel without first 'phoning the power department, the power company—rather, the University Power Division, where we get our power, and it would be first necessary to 'phone them, and if the tunnel was operated at night we would immediately find out about it, because we don't run at night. In order to secure the necessary data to attach a Zap flap to a Grumman airplane, the type or model of airplane he would use in wind tunnel tests was generally the Grumman airplane.

In order to secure data for attaching a Zap flap on a Grumman airplane, it would not be desirable to rely on wind tunnel data which had been secured on some other model of airplane because the basic characteristics may be different. I would like to

(Testimony of James Herbert Dwinnell.)

make it clear, though, that you could run tests of a wing by itself and put a flap on it and expect to get similar results on any type of airplane to which you attached it. The practice in order to secure the data to attach a Zap flap to a Grumman airplane, the type of model I would use for final tests and final analysis, is a Grumman airplane.

[115]

Recross Examination

By Mr. Lavine:

Mr. Zap was trying out the Vought-Sikorski plane up there; a part of it. I couldn't tell you whether he was testing out flaps, as a basic principle, to any type of plane that might fly for the Navy. The two-dimensional model applies to any type of plane. That type of test is used specifically for basic analysis to see what would happen on any particular kind of airplane. It is a general test that is used for estimating what you might expect on any type of airplane. The calculators did not work at night, without special arrangements from us. As far as I know they didn't work at night, unless Mr. Zap or one of his representatives made specific arrangements. That is the only way that it is supposed to be worked. I couldn't tell you whether some of the students worked as high as 160 some-odd hours for Mr. Zap.

The Court: Exhibit 8 shows the amount of hours they worked, counsel. 960 on one job there, the second job.

(Testimony of James Herbert Dwinnell.)

Mr. Lavine: Oh, yes, I see. Well, I was trying to break it down.

The Witness: Some students worked a smaller number of hours and some worked longer hours. In connection with Mr. Zap's work, he was always anxious to get the work done at the earliest possible time and in the most expeditious fashion; but it's regardless of how much time he was [116] allotted. He seemed to be in a terrific hurry to get everything done, whether he had a week or two weeks to do it. In other words, he was a high-speed man around our laboratory. I can show you a letter from one of our files here, "Attention wind tunnel supervisor," from E. F. Zap, signed "H. S. McGill." I know Mr. McGill. I have met him there; I don't know whether he is Chief Engineer for the Zap Corporation. It is correct, I met him at the wind tunnel; he was conducting experiments with Mr. Zap, either with him or by himself; I have forgotten. This is one of the letters I brought with me.

Mr. Lavine: I offer this letter as defendants' next in order.

The Court: I will let it in. I will let it in.

The Clerk: Defendants' Exhibit K, in evidence.

(The document referred to was marked Defendants' Exhibit K, and was received in evidence.)

Q. By Mr. Lavine: Now referring to a letter I will show you, if we might take this apart—I think this is the only part material. Description of pro-

(Testimony of James Herbert Dwinnell.)

poled two-dimensional flow tests. That report 154 that you had and the pictures that you identified were of a two-dimensional flow test; isn't that correct?

The Witness: That is correct, for report 154. This is a description of the matter sent me as to the proposed test and the proposed model.

The Clerk: Defendants' Exhibit L, into evidence. [117]

(The document referred to was marked Defendants' Exhibit L, and received in evidence.)

Mr. Lavine: I would like to offer these additional exhibits which the Government has seen, as defendants' exhibit next in order.

The Clerk: That will be Defendants' Exhibit M, into evidence.

(The document referred to was marked Defendants' Exhibit M, and received in evidence.)

The Witness: I am familiar with tuft tests that were made at the University. The tuft tests are applicable to any particular type of ship.

Mr. Lavine: We offer these letters as defendants' next in order.

The Clerk: Defendants' Exhibit N, in evidence.

(The document referred to was marked Defendants' Exhibit N, and received in evidence.)

The Clerk: Exhibit O, into evidence.

(The document referred to was marked Defendants' Exhibit O, and received in evidence.)

(Testimony of James Herbert Dwinnell.)

Mr. Lavine: I offer these as next in evidence.

[118]

Mr. Lavine: I offer these as next in evidence.

The Clerk: Defendants' Exhibit P, into evidence.

(The document referred to was marked Defendants' Exhibit P, and received in evidence.)

The Clerk: Defendants' Exhibit Q in evidence.

(The document referred to was marked as Defendants' Exhibit Q, and was regeived in evidence.)

Mr. Lavine: I wish to read one letter and the rest I will reserve for such time as we may think it important. Reading from the Defendants' Q in evidence:

"9 February 1940.

"Professor V. J. Martin,
Department of Aeronautical Engineering,
University of Washington,
Seattle, Wash.

My dear Professor Martin:

This letter is in connection with Navy Department Contract No. 69327, Mr. Edwin F. Zap, contractor, which requires the development of certain devices to reduce aerodynamic drag and improve the lift of several service type airfoils in use on new Navy service aircraft.

Mr. Zap's contract is being handled through this office and he requires the use of a wind-tunnel for a few days in order to complete the

(Testimony of James Herbert Dwinnell.)

investigations involved. The use of the local wind- [119] tunnel at Cal Tech cannot be obtained until about 15 March, due to prior reservations, which of course results in a corresponding delay in getting the project completed and in the hands of the Bureau of Aeronautics (Navy Department). We have been informed that your wind-tunnel at the University of Washington might be available for this work and, accordingly, I am writing you to ask your cooperation in an effort to expedite this project, which is regarded as highly important by the Department.

In the event that you can make your wind-tunnel available to Mr. Zap at any time during the next two or three weeks, will you kindly inform me at once giving the dates when the tunnel can be allocated to our development project. This office will keep Mr. Zap informed.

Very truly yours,

L. D. WEBB,

Commander, U.S.N."

R. C. DAVIS,

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please. [120]

(Testimony of R. C. Davis.)

The Witness: Raymond C. Davis.

The Court: Take the stand, please.

Direct Examination

By Mr. Maury:

I am the Controller of the University of Washington at Seattle. As such I have the books and records of the accounts of that institution under my supervision and control. I am familiar with the account of Edward F. Zap with the University of Washington.

The Court: Government's Exhibit 16 for identification.

(The document referred to was marked as Government's Exhibit No. 16, and was received in evidence.)

By the Witness: Government's Exhibit 16 in evidence is a bill which the University of Washington, a carbon copy, sent to Edward F. Zap in this city.

Q. And does it truly reflect the account of the University of Washington with Mr. Zap?

A. There is a credit memorandum that went out subsequently that does not appear here.

The Clerk: This will be Government's Exhibit 17 in evidence.

(The document referred to was marked as Government's Exhibit No. 17, and was received in evidence.)

(Testimony of R. C. Davis.)

Q. By Mr. Maury: Calling your attention to Government's Exhibit 17, is the credit memo of which you speak, or a [121] carbon duplicate thereof?

A. It is in the sum of $86.40. Deducting this credit of $86.40 from the total shown on Government's Exhibit 16 in evidence we arrive at the true balance which Mr. Zap owes the University. I cannot tell from what period of time that date covers. I can tell you the date up to the time it covers, but not the exact period; that is, I cannot tell you the dates between the date it covers, the work we did for Mr. Zap subsequent to some time in 1942, up to July 31, 1941. By examining the ledger sheets of the University of Washington I can make that determination.

Calling my attention to those two sheets of paper now I believe marked Exhibit 18, for identification —I can tell that these are the original ledger sheets of the University of Washington. The account of Edward F. Zap is there. The invoice previous to this invoice here is dated September 3rd, 1941. And this was the next subsequent invoice. (Indicating Exhibit 16.) That previous invoice of September, 1941, was paid. That may not have cleared the account at that time, because there may have been some work in the tunnel subsequent, or prior, to September 3rd; there may have been a small lapse in there, because the original record is made up and sent to my office, then there is a record in the wind

(Testimony of R. C. Davis.)

tunnel records that would reflect that. However, there is a charge there of $1630.67, and a credit of the same amount. And the next charge is identical with [122] that. The final entry under the Zap account is the credit memorandum of $86.40.

Q. By Mr. Maury: Mr. Davis, did that invoice, Exhibit 16, include all the charges for electrical power which was used by Mr. Zap on this tunnel from the period ending or beginning September, 1941, and ending as of the date of that invoice?

A. As far as I know it must have. When I say "it must have"—the University has a contract with the Puget Sound Power & Light Company, and we have a master meter, and all the billing to the University is done by the Puget Sound Power & Light Company under the master meter. However, there is another meter in the wind tunnel that is used solely for the purpose of determining the amount of power used at the wind tunnel and that is charged to our customers.

Then the Power & Light Company bills you from the master meter, and the bill arrives in our office personally.

I couldn't say positively whether or not the power company bill has been paid by the University for each and every month from the period beginning August 1st, let us say, 1941 and ending December, 1942. I have not examined the record, but it is possible that there might be some outstanding.

(Testimony of R. C. Davis.)

Cross Examination

By Mr. Lavine:

I sent you a copy of this credit memo in a letter. I have not received any payment as yet. [123]

Q. Now, in connection with your accounts receivable here, your records here go back to June, about 1940, I believe, that Mr. Zap—January 2, 1940, E. F. Zap, and No. 155, and then there appears to be some cancellation.

A. That was an error. The University of Washington makes errors occasionally. On January 19th Mr. E. F. Zap was billed and that bill was for $1,117.50.

Q. And there was a payment of $500?

A. That is right. It was not a payment. It is the application of a guarantee deposit—a guarantee deposit on this invoice. We had the money and we credited it to this invoice. That was to be used as a guarantee of the payments.

Q. Now, you had a payment again, however, you had a payment on March 13th—11th, 1940, of $517.50 by Mr. Zap. And then February 5th there was another bill and that seems to be cancelled again? Another mistake? Is that right?

A. Well, a clerical error—let's call it that.

Q. All right. July 30th, Mr. Edward F. Zap was billed again, and that amount was $896.16.

A. We received payment of $896.16. We have another bill to Mr. Zap, February 14, 1941, for

(Testimony of R. C. Davis.)

$2617.49. I received $2617.49. We had another bill on September 3rd, Mr. E. F. Zap, $1630.67. We received $1630.67 from Mr. Zap. On August 28th we billed Mr. Zap for $5295.56. We have since sent a letter about it and our records show no payment. [124] That item of $5295.56 is for the work done from the former occasion when Mr. Zap was there; at least, it was for the work done during 1942. We used the $500 as the first payment on this first invoice. We have credited Mr. Zap on March 25th with $86.40.

I have records to show that the $500 was credited against the thousand dollar invoice and that the $500.00 guarantee fund was used to pay the other half of the $1,000 invoice after the payment of $517.50 in cash was received. The correspondence on the last item was March 25, 1943; a copy of that was mailed to Mr. Zap and Mr. Lavine, together with a copy of my letter explaining the clerical error.

In connection with these different items—this item to Mr. Zap of January 19th, showing bill March 5, 1940—we billed that on March 5, 1940, and received payment on March 13, 1940. And then the second item on the bill here; billed that on February 18th, and it was paid on March 3, 1941. And the billing on the next item was billed September 3, and it was paid September 26th, 1941. And the only one that has not been paid is the last item on our bill.

LUCIEN SMITH MINOR,

recalled as a witness by and on behalf of the Government, having been previously duly sworn, was examined and testified as follows: [125]

Direct Examination

By Mr. Binns:

Q. Lieutenant Minor, during your period of duty as Naval Cost Inspector did you receive a letter concerning naval project contract between the United States Navy and Edward F. Zap for design work on a cargo carrying airplane?

A. No, I didn't. The first I ever heard of that was when this investigation was begun.

Q. Was there a contract existing between E. F. Zap and [125-a] the Navy, providing for design work on that item of a cargo carrying airplane?

A. Not to my knowledge.

Mr. Lavine: I object to that, not the best evidence.

The Court: He asked him whether or not he knew of his own knowledge. Do you know about it? What you know about it, not what the Navy knows about it. Did you handle any such?

The Witness: No, not to my knowledge.

Mr. Binns: I have a group of documents to be marked for identification. I would like the record to show they have been examined by the counsel for the defendants during the morning hours.

The Court: All right.

The Clerk: That will be Government's Exhibit 19.

(Testimony of Lucien Smith Minor.)

Mr. Binns: Could I have these broken down into separate exhibits, these that are clipped together?

The Clerk: You want them separate?

Mr. Binns: I will hand them to you in order.

The Clerk: All right.

Mr. Binns: I hand you this group wrapped in blue ribbon with the seal of the United States, of the Comptroller General of the United States, containing four documents.

The Clerk: Government's Exhibit 19 for identification.

(The documents referred to were marked as Government's Exhibit No. 19 for identification.) [126]

Mr. Binns: I hand you another group under the seal of the Comptroller General's office containing five pages.

The Clerk: Government's Exhibit 20 for identification.

(The document referred to was marked Government's Exhibit 20 for identification.)

Mr. Binns: I hand you one document under the seal of the United States Navy.

The Clerk: Government's Exhibit 21 for identification.

(The document referred to was marked Government's Exhibit 21 for identification.)

Mr. Binns: I hand you a document dated June 26, 1942 signed "Edward F. Zap."

(Testimony of Lucien Smith Minor.)

The Clerk: Government's Exhibit 22 for identification.

(The document referred to was marked Government's Exhibit 22 for identification.)

Mr. Binns: I hand you what purports to be a copy of a document labeled "Schedule C".

The Clerk: Exhibit 23 for identification.

(The document referred to was marked Government's Exhibit 23 for identification.)

Mr. Binns: I hand you a document with the seal of the United States Navy containing two documents.

The Clerk: Exhibit 24 for identification.

(The document referred to was marked Government's Exhibit 24 for identification.) [127]

Mr. Binns: I hand you a group of six documents, the first of which says, "Endorsement resident inspector of Naval Aircraft, El Segundo, California."

The Clerk: Exhibit 25 for identification.

(The document referred to was marked Government's Exhibit 25 for identification.)

Mr. Binns: I hand you two documents, the first of which says, "Certificate of Withdrawal from Naval Control Accounts."

The Clerk: Exhibit 26 for identification.

(The document referred to was marked Government's Exhibit 26 for identification.)

(Testimony of Lucien Smith Minor.)

Mr. Binns: I hand you two documents, the first of which says, "Certificate of Withdrawal from Navy Control Accounts."

The Clerk: That will be 27 for identification.

(The document referred to was marked Government's Exhibit 27 for identification.)

Mr. Binns: I hand you a document dated October 30, 1942 signed by E. F. Zap.

The Clerk: Exhibit 28 for identification.

(The document referred to was marked Government's Exhibit 28 for identification.)

Mr. Binns: I hand you three documents, the first of which is dated October 30th, addressed to the Disbursing Officer of Supplies, and Accounts.

(Government's Exhibit 29 for identification, 30 for identification, and 31 for identification were marked by the Clerk.)

Q. I show you this group of documents marked Government's Exhibit 29 for identification and ask if you have even seen [128] those documents before. Please go through these documents from the beginning to the end? A. Yes.

Q. Will you please identify each document separately for us and tell us what it is? [128-a]

By the Witness: The first is a public voucher No. 39, that being the number assigned to it by our office, in connection with contract No. s83142.

Q. Is that document prepared by your office?

A. Yes.

(Testimony of Lucien Smith Minor.)

Mr. Binns: I ask that that document be admitted in evidence at this time, your Honor.

The Court: In evidence.

(The document referred to, heretofore marked Government's No. 19 for identification, received in evidence.)

The Court: Gentlemen of the jury, we will take a recess until 1:00 o'clock tomorrow afternoon.

(Thereupon, at 6:10 p. m., an adjournment was taken until 1:00 p. m., Friday, April 9, 1943.) [129]

LUCIEN SMITH MINOR,

recalled as a witness and on behalf of the plaintiff, having previously been duly sworn, was examined and testified further as follows:

Direct Examination
Resumed

By Mr. Binns:

At the close of court yesterday I was telling you what the first document was which is contained in the group of documents marked Government's Exhibit 19, for identification. The first document is public voucher No. 39. That is the number assigned by the cost inspector's office, covering cost incurred on Contract No. 83142. That is my signature which appears in the middle of the document. The second document is public voucher No. 40 on the same contract. That is my signature which appears in the

(Testimony of Lucien Smith Minor.)

center of the document. Those documents are signed by Mr. Zap. The third document of this group submitted by Mr. Zap covered traveling expenses, subsistence, etc., incurred by his employees while at Daggett Field on 28th-31-42. The third document was part of the supporting data for the preparation of Voucher 39. The fourth document is an invoice submitted by Mr. Zap which I saw at the time the public voucher for payment thereof was prepared in his office; it is the document upon the basis of which I prepared the voucher previously identified as number 40. [130] I am showing you the fifth and last document of this group; I have seen that document before, in my office. That document is additional support for voucher 40.

Mr. Binns: I offer this group of documents in evidence at this time, your Honor.

(The documents referred to were marked Government's Exhibit 19, and received in evidence.)

Mr. Binns: I am reading at this time from the fifth of the documents admitted in evidence as Government's Exhibit 19.

"I, Edward F. Zap, do hereby certify that I have paid to William McAvoy the sum of Four Thousand and no/Dollars as payment for flight test of OS2U2, under terms of contract No. 83142, this being paid by my check, 4679, dated 9-23-42. "Edward F. Zap."

(Testimony of Lucien S

Pardon me. The numb
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(Testimony of Lucien Smith Minor.)

Government's Exhibit 23 for identification; it was prepared in our office in support for voucher under Contract 4105.

Government's Exhibit 23 received in evidence.

I have seen Government's Exhibit 22 for identification; Mr. Zap submitted it to us for reimbursement.

(Voir Dire) By Mr. Lavine: Mr. Zap gave us a mimeographed copy signed; he did not hand it to us personally; [130-b] I do not know who typed it; I know where it was typed; I did not see it typed; nor did I see someone prepare the document. I first saw it in my office in Beverly Hills; Mr. Zap was not present when I first saw it.

Mr. Lavine: I object, your Honor. There is no proper foundation laid for that document.

Q. By Mr. Binns: I asked you, Lieutenant, did you see the original of the document of which Government's Exhibit 22 for identification purports to be a copy?

Mr. Lavine: Just a minute. I object to that as calling for the conclusion of the witness, and not the best evidence.

The Court: That is proper, to ask him that. You ask the witness if he saw the station down here at noon.

Mr. Lavine: But where there is a document available to the court and to the counsel, "I forget as to whether or not this is an original," is merely a conclusion of this witness. Your Honor, that is my point. We can see whether it is an original.

(Testimony of Lucien Smith-Minor.)

The Court: Let us have the document. Where is it?

Q. By Mr. Binns: Can you tell us, Lieutenant, where the original of that document is?

Answer: The original of that document, I believe, is attached to the voucher, to the original copy of the voucher, and payment was made to Mr. Zap.

[130-c]

Mr. Lavine: It is available here by certification, as you have produced the other documents, or the original, your Honor.

Mr. Binns: You are anticipating, Mr. Lavine. I have not offered the document in evidence. All right.

Q. By Mr. Binns: Lieutenant, can you look at Government's Exhibit 21 and tell us if—and tell us what was included under the heading Schedule C on that Government's exhibit?

Mr. Lavine: Just a minute, Lieutenant. I object to that as calling for the conclusion and opinion of this witness; certainly not the best evidence. Here is a typewritten document and this witness is being asked to tell something about the meaning of some paragraph, or some phrase or construction of this document.

Mr. Binns: I will withdraw that.

The Court: The document speaks for itself, I think.

Mr. Lavine: Yes, your Honor. In that I concur.

The Witness: We prepared Exhibit 21 in our office.

By Mr. Lavine: Schedule C is prepared in the

(Testimony of Lucien Smith Minor.)

form of a written schedule, but it is Government's Exhibit 23.

The Witness: The seventh item in Schedule C attached to Government's Exhibit 23 was included in that schedule upon a certification by Mr. Zap to the effect that he had paid the University of Washington $500 to cover [130-d] power costs, power to be used in the wind tunnel; that voucher was prepared under my direction; I saw it prepared; I signed it; it was made up by Miss Muriel B. Sando, the typist in our office. It was based upon a request of Edward F. Zap; Mr. Zap submitted an invoice signed by himself; over his signature. Mr. Zap personally did not submit the invoice to me personally; my recollection is that Mr. Zap submitted the invoice to Mr. Byars; I know Mr. Byars and I discussed it with Mr. Zap; in Mr. Zap's office, in Mr. Byars' presence, after Mr. Zap had submitted it, we questioned it, and attempted to question him and ask an explanation of this $500 charge; that was about the latter part of June.

The Witness: At this conversation to which I just testified concerning the $500 charge which is itemized in Schedule C, Government's Exhibit 22, we went to Mr. Zap and made inquiry of him as to why the payment has been made. His reply was to the effect that he had made a deal with the Seattle Power Company by which he could save considerable money by paying them direct for power cost. This $500 covered a partial payment they

(Testimony of Lucien Smith Minor.)

paid them for power, so at that time with that explanation we requested him to prepare a more detailed invoice, certify it and get its approval by the technical inspector. [130-e]

Government's Exhibit 24 for identification was received in evidence.

Government's Exhibit 25 for identification was received in evidence.

Government's Exhibit 26 for identification was received in evidence.

Government's Exhibit 27 for identification was received in evidence.

Government's Exhibit 28 for identification was received in evidence.

Government's Exhibit 29 for identification was received in evidence.

Government's Exhibit 31 for identification was received in evidence.

Government's Exhibit 30 for identification was received in evidence.

(The following proceedings were had at the bench, out of the hearing of the jury:)

Mr. Lavine: I would like to have Mr. Myerson come up so that I can interrogate him, your Honor.

The Court: All right.

Mr. Maury: To which we object.

The Court: What is the point?

Mr. Lavine: This was part of an illegally searched [130-f] and seized document taken from the plant of Zap, and at this time we are going to move to suppress the evidence so taken.

(Testimony of Lucien Smith Minor.)

The Court: Wasn't that all passed upon by Judge Yankwich?

Mr. Lavine: The preliminary part was passed upon, yes, [131] sir, but as I read the Weeks case, your Honor, we should renew the motion in the trial court.

The Court: I will deny it if Judge Yankwich has passed on it. I will not go over all the matters he has passed on, gentlemen. So make your motion.

Mr. Lavine: I at this time move to suppress the evidence in connection with a book of check stubs which is now being taken, and evidence is attempted to be offered in connection with the stubs on examination of the witness Minor. These stubs are numbered 4 to 300, and also contain apparently some cancelled checks and returned checks of various kinds and character. We would like to inquire from Mr. Myerson as to what date these were taken and under what authority, your Honor. We were not permitted to examine—we did not have any testimony from Mr. Myerson before Judge Yankwich. We proceeded on affidavits.

The Court: The evidence you are asking there is now in the absolute possession of the defendants, because if they were defendant's property and taken from him, the defendant would be in as good a position as anyone else to know the date they were taken.

Mr. Lavine: No, your Honor. The situation was that Mr. Zap was out of the city. He was in Washington, D. C.

(Testimony of Lucien Smith Minor.)

The Court: Did they break in?

Mr. Lavine: No. The agents were in the office of the defendant's place of business. [132]

The Court: Were there some of Mr. Zap's employees there?

Mr. Lavine: Yes, there were some employees there.

The Court: Then he ought to know the date.

Mr. Lavine: The dates set forth in the affidavit, I believe, are on or about November 5th, and dating from October 30, 1942. Now the alleged basis for taking of these articles was an affidavit of Mr. Myerson that he had seen these various articles on a previous occasion. That affidavit was filed as of December 1, 1942. However, we object to the use of this evidence, and at this time we object to it on the grounds that it is violative of the Fourth and Fifth Amendments to the Constitution of the United States, and request that the evidence be suppressed on that ground, and that it be returned to the defendant Zap.

Mr. Maury: The position of the Government, of course, your Honor, has been laid before Judge Yankwich's division of this Court; namely, that under the contracts 83142 and NXs 4105, now in evidence, the defendant Zap covenanted and agreed with the Government that all of his books and records and financial statements and books of account and other records of the enterprise might at all times be subject to the scrutiny of the proper gov-

(Testimony of Lucien Smith Minor.)

ernmental officials; that during ordinary business hours they should be open to the audit by Navy inspectors and Navy auditors; that by the affidavit of Hilton Byers the foregoing is shown and that the Court [133] can now see it from the contracts in evidence; further, that the return on the search warrant is sufficient evidence of the date of the taking, inasmuch as it shows upon its face and is a record of this Court, whatever date it was, I believe it was about December 1, 1942; that if it is not in the files of this Court but in the files of the United States Commissioner's office, then a true and correct copy thereof is attached to the affidavits filed in connection with the previous motion to suppress made with respect to the documents involved, and of which the document in counsel's hand, namely, the check stub book, as previously described by him, is one.

Mr. Lavine: Now, in answer to that, your Honor,——

Mr. Maury: Just a moment.

Mr. Lavine: Pardon me. I thought you were through, counsel.

Mr. Maury: On the further ground that to try the motion here and now would be to dismiss the jury for perhaps two or three days, would reverse the ruling of Judge Yankwich as to the form of how the motion should be handled, that is, as upon affidavits or upon oral testimony; upon the ground of surprise; that we had no previous notice that this motion for the taking of oral testimony or a motion

(Testimony of Lucien Smith Minor.)

to suppress would be brought before the Court at this time; and upon the further ground that no right of the defendant Zap has been invaded under the contracts which are now in evidence before the Court, and that at all times the Government had a right to [134] inspect these documents, and under the search warrant issued by this Court the Government had the right to take into possession these documents.

Mr. Lavine: In answer to that, your Honor, I wish to point out, first of all, that the right of inspection to which counsel refers is only a right to audit and to permit the books to be seen by the auditing office of the United States Navy, not to be unlawfully seized and taken by members of the Federal Bureau of Investigation; that there is nothing in the contract that permits that unlawful search and seizure, which is forbidden by the Fourth and Fifth Amendments, nor the use of evidence so obtained.

As to the particular documents, the affidavit of Investigator Myerson was to the effect that on a previous occasion he had seen these particular documents. His affidavit did not set forth that he was getting them by reason of any investigation or by reason of any audit made by any departmental agency of the Government; furthermore, the evidence by affidavit, which is uncontroverted, shows that they were unlawfully taken, without any search warrant at the time they were actually taken and

(Testimony of Lucien Smith Minor.)

seized, and that they were taken by members of the Federal Bureau of Investigation, not by Navy cost inspectors whose only authority was to inspect it. These were the property and personal property of Mr. Zap, and they were at his regular place of business. He was out of the city at the time the inspections [135] occurred. No one, therefore, had a right to seize them and take them away under our Fourth and Fifth Amendments.

Now, in connection with the further claim of the Government of surprise, of course, that is untenable because in the course of trial that is the second opportunity when a defendant makes his objections to the use of unlawfully searched and seized evidence. That is the doctrine in the Weeks case; that is the doctrine of Gouled vs. United States in 65 Law Edition. That is the doctrine enunciated in the Goldman case, which was decided at the last term of court, which contained a very strong opinion outlining many of the principles which I have set forth in the dissenting opinion of Judge Murphy.

I set forth my position here very fully, your Honor, and your Honor may appropriately rule. I do feel I have a right to take Myerson's testimony at this time, which we never did have the opportunity of taking. We could not necessarily, under the position he occupies, get an affidavit from him. Our only opportunity to secure his testimony is by placing him on the stand. He is here in court. We wish to do that.

(Testimony of Lucien Smith Minor.)

The Court: What do you want to show by him?

Mr. Lavine: I want to show——

Mr. Maury: To that we object, your Honor.

The Court: Yes, I know.

Mr. Maury: Because there has been an offer of proof [136] made in writing by counsel in the motion before Judge Yankwich, and ordered stricken from the files. No subpoena was issued for the witness Myerson by the defendant, and no request was made for his presence in court at the time of the hearing; and the record is also here, a portion which has not been mentioned by counsel, namely, the affidavit of Hilton Byers, the senior cost accountant for the Navy, who has stated to this Court that the Federal Bureau of Investigation for a period of some weeks were at the Zap plant inspecting these books under his observation and his authority under these contracts, and tracing that authority from the F.B.I. to the Navy cost accountant, to the contracting officer, right back to the United States, that is the alleged unlawful search and seizure.

The Court may, of course, not be so familiar with the record. This was before Judge Yankwich when he ruled upon the motion. But there were two search warrants; one issued by the United States Commissioner upon the 31st of October, and the second one issued by the United States Commissioner about the 1st of December; about 30 days apart. The allegation is that there was an unlawful search

(Testimony of Lucien Smith Minor.)

and seizure made some time during those periods, between those two dates. The affidavit of Byers shows that the agents of the F.B.I. were there under his authority during that period of time, and that authority, of course, traces right back to the contracts which the defendant Zap entered with the United [137] States Navy. That is the state of the record, and I merely desire to call that to your Honor's attention. I feel that it is highly improper at this time to seek to elicit testimony as to a purely collateral matter. The record is replete. The defense has had ample opportunity to complete its record in that respect. The record has been before the Court. It has been thoroughly and fully considered and has once been ruled upon by Judge Yankwich.

Mr. Lavine: In answer to that, your Honor, insofar as the statement of Hilton Byers is concerned, Hilton Byers is a civilian cost inspector of the United States Navy. His authority under the contract which is here shows no authority whatever to permit the F.B.I. or anybody else to take those records, papers or documents. There is nothing in the contract that permits their removal or confiscation or search or seizure. One contract gives the authority merely to audit and inspect, and the other gives authority to make a full inspection. It does not give the authority to search and seize them. The authority of the F.B.I., it seems to me, does not extend to taking matters that belong to a pri-

(Testimony of Lucien Smith Minor.)

vate party unlawfully and without a search warrant, as were several of these documents here in question.

Now in connection with our right to produce the evidence, if there is any doubt in your Honor's mind, I think both the Weeks case and the Gouled case will settle that in your Honor's mind, that at the time of trial we have the [138] right to take the evidence. We don't have to subpoena witnesses who are in court and under the Court's control and are here present. And we have a right to show by the evidence the unlawful seizure by any other witnesses that may be available.

The Court: You mean after it has already been passed on by a court?

Mr. Lavine: Yes. There are two times when it has to be passed on, your Honor.

The Court: I know, but I say after it has been passed on?

Mr. Lavine: Yes.

The Court: You have the right to open up the whole question again? That is your contention?

Mr. Lavine: Yes. If there is any question in your Honor's mind, if you will send for the Weeks case.

The Court: Your position is that you can come in first and fully argue the matter of suppression of evidence and have a decision by the Court, and then at the trial you again can have a rehearing of the entire matter?

(Testimony of Lucien Smith Minor.)

Mr. Lavine: That is right.

Mr. Maury: May I read into the record, your Honor, a certain excerpt from contract 83142, now being Government's Exhibit 3 in evidence? Reading from the third page thereof: "The accounts and records of the contractor shall be open at all times to the Government and its representatives." [139]

Mr. Lavine: Nothing there about seizing them.

Mr. Maury: Yes, sir. "The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government."

Now reading from the other contract, namely NXs 4105, which is now Government's Exhibit 4 in evidence, Article V: "The contractor shall keep records and books of account showing the cost of performing this contract."

Then it deals with the method of accounting.

Section B: "The contracting officer and his authorized representatives shall at all reasonable times have access to all records and books of account pertaining to this contract."

The contracting officer is defined above, as follows: "This contract, entered the 15th day of May, 1942, by the United States of America, hereinafter called the Government, represented by the contracting officer executing this [140] contract——" That is the designation of the officer.

The Court: Well, I think Mr. Lavine is just pro-

(Testimony of Lucien Smith Minor.)

tecting his rights by keeping his record so that he isn't going to be foreclosed on his record.

The matter has been fully passed upon, as I read the files, by Judge Yankwich, and he suppressed certain checks the Government has seized, but did not grant all of the motion requested by the defendants, and the suppression of all of the evidence and the particular document that now is purported to be inquired about and offered was not suppressed by Judge Yankwich. The motion is overruled and exception is allowed to Mr. Zap.

Mr. Maury: Thank you, your Honor.

Mr. Lavine: Just a minute, Mr. Maury.

At this time the defendant Zap offers to prove by the witness Myerson that on or about November 5, 1942, in the offices of Edward F. Zap he took a certain check for $4,000 without any search warrant and that, further, he took certain check stubs which are here indicated; that at that time he had no search warrants for the taking of these particular documents; that his subsequent taking of various books, records and accounts was based upon a daily check and search and seizure of the premises of Mr. Zap while Mr. Zap was out of the city and not present, and that his subsequent seizure and taking of those documents to the office of the Federal Burea uof Investigation was based [141] upon that investigation and that search.

Mr. Maury: To which we object on the ground and for the reason that the check for $4,000 is al-

(Testimony of Lucien Smith Minor.)

ready in evidence, has been so admitted by the Court, without objection on the part of the defendant, yesterday, and is now the Government's Exhibit——

Mr. Lavine: I am coming to that, that check for $4,000, and at this time we move to strike from the evidence the check for $4,000 and have the jury instructed to disregard it as not properly in evidence in this case because it was unlawfully seized by the Government, without proper search warrant.

Mr. Maury: May I finish, please?

Mr. Lavine: Yes.

Mr. Maury (Continuing):——and is now the Government's Exhibit 7, in evidence; that the same was received by the Court yesterday in open court, before the Court and the jury in attendance; that no objection was made at the time of its being offered by the Government, and that no exception was taken to its admission in evidence; and that the offer of proof is also too late. It pertains to a matter which has become moot in so far as the check, Exhibit 7, is concerned, and that so far as the other matters therein contained are concerned, they are covered by the affidavit of Murray Myerson and Hilton Byers, and that the testimony would be a mere waste of the time of the Court and counsel [142] to make a record which is already before the Court and which has already been passed upon.

The Court: This $4,000 check, as I understand the record, was not one of those that Judge Yankwich suppressed.

(Testimony of Lucien Smith Minor.)

Mr. Maury: No, sir, it was not.

Mr. Lavine: No, your Honor.

Mr. Maury: The Government has not offered any of those checks which Judge Yankwich suppressed, and will not offer them, your Honor, during the course of this trial.

The Court: Now, Mr. Lavine has his offer of proof on there. His motion to strike will be denied.

Mr. Lavine: Exception noted. And the offer of proof, is that rejected?

The Court: Rejected.

Mr. Lavine: Exception noted.

And the right to call Mr. Myerson, as I understand, is refused?

The Court: Yes.

Mr. Lavine: And exception noted.

Mr. Maury: Let us reframe that. Is it the right to call Mr. Myerson that is rejected as a witness for the case in chief, or the right to call Mr. Myerson as a witness to testify to these ancillary matters?

Mr. Lavine: Yes, to the matter of the unlawful search and seizure.

The Court: Yes. Mr. Lavine I think made that clear; [143] that was the only reason he wanted to call him.

Mr. Lavine: Yes. Exception.

Mr. Maury: I just wanted the record perfectly straight.

(The following proceedings were in open court, in the hearing of the jury:)

(Testimony of Lucien Smith Minor.)

Mr. Binns: May I have this group of check stubs marked as Government's Exhibit next in order, for identification?

The Clerk: Government's Exhibit 32, for identification.

(The documents referred to were marked as Government's Exhibit No. 32, for identification.)

Witness Continues:

This book of check stubs marked Government's Exhibit 32, for identification, I have seen that before at Mr. Zap's office. It is Mr. Zap's book of check stubs. I visited the plant of Mr. Zap I would say on an average of once a week over a period of eight or ten months. Some investigation would be made practically every time I made a visit there, of certain items.

Q. Can you tell us on how many occasions you saw Government's Exhibit 32, for identification?

Mr. Lavine: Object to that as irrelevant, incompetent and immaterial.

The Court: Overruled.

The Witness: I would say approximately 20 to 25 times. I audited myself certain transactions, and under my direction [144] certain others were audited. The document identified as Government's Exhibit 32, for identification was one of the books that was used in conducting that audit. I have examined that check record.

By Mr. Binns: In order to ascertain the correct-

(Testimony of Lucien Smith Minor.)

ness of entries made in that check record to what document do you go?

Mr. Lavine: Object to that as irrelevant, incompetent and immaterial, too general.

The Court: Of course that is self-evidence; where did he go? Overruled.

The Witness: We would go to the cancelled checks. In connection with the cancelled checks, we examined the check stubs. The check stubs were contained in Government's Exhibit 32 for identification.

Mr. Binns: I again offer Government's Exhibit 32 in evidence, your Honor.

Mr. Lavine: Objected to as irrelevant, incompetent and immaterial, no proper foundation laid, your Honor.

The Witness: Government's Exhibit 32, for identification, was submitted to me for audit by Mr. Zap.

Mr. Binns: I again offer it in evidence, your Honor.

The Court: Admitted.

Q. By Mr. Lavine: Did Mr. Zap personally submit those books to you?

A. This particular book was submitted to me many times.

Q. Just a minute. You can answer that yes or no. [145] A. Yes.

Q. Did he submit that to you personally?

A. Yes.

Q. When?

(Testimony of Lucien Smith Minor.)

A. On several different occasions.

Mr. Lavine: That is all.

The Court: It is in evidence.

The Clerk: That will be Government's Exhibit 32, into evidence.

(The document heretofore marked for Identification as Government's Exhibit 32, was received in evidence.)

Cross Examination

By Mr. Lavine:

I have been in the Navy about 14 months. I came from civilian life. I am 27. Prior to coming into the Navy, I was an auditor for General Mills, Incorporated, out of Minneapolis. I entered the Navy as an ensign and have been in there the past 14 months. My first job was cost inspecting, and has been since that time. As a cost inspector I have, naturally, checked very carefully all the records and accounts of the various items that I was due to inspect.

I had a maximum of three auditors at Mr. Zap's place, I believe, at any one time; Mr. Balzer, Mr. Byers, and Mr. Watkins. Those were the most there at any one time. There were others; Mr. Combes at one time did some work on it. Mr. Zap's place was not a very large place. I don't know [146] that it was the smallest of the airplane manufacturers in this district. I would hate to hazard a guess as to the most number of employees it ever

(Testimony of Lucien Smith Minor.)

had there during the time that I was around there. I am not familiar with what he had at his plant. I would say a maximum of probably 100 were working there. I would guess the minimum down around 40. That may be off, but that is the best of my recollection of it. We started checking the Zap plant February 1942. Oh, the last time we were in there was the latter part of November, 1942. Now, in connection with this voucher summary of other direct charges—yes, Exhibit 20, the same exhibit. It is the next page in order, sheet No. 1. There is a signature of Edward F. Zap on the back of it, that is correct.

Then underneath that I have my certificate: "I hereby certify that I have examined every invoice or voucher pertaining to the charge listed on this summary or such invoices or vouchers have been examined by Navy employees under my supervision, and have found them to be correct charges to the Navy under contract 83142." I put that certificate on there. We examined that particular invoice, and at the time we thought it was correct. As to whether I personally examined it, I wouldn't say that I personally examined it at that time. I have since examined it. Either Mr. J. W. Combes or Hilton J. Byers examined it. I wouldn't say positively which of the two. I know an examination was made by a qualified Navy employee. [147]

The Court: Let us have no argument with the witness. He has answered your question very fairly,

(Testimony of Lucien Smith Minor.)

Then counsel comes back with an argument and then says "You don't know." He said it was either one of those. That is the answer, Mr. Lavine.

Mr. Lavine: That is your signature to that certification?

The Witness: That is correct.

Q. By Mr. Lavine: Now let us get back a little bit, Ensign Minor, to your system that was invoked in the Navy and particularly in that plant. First of all, before any charge was made on any cost-plus items, there was submitted to you or some man under your direction, a form, a request for inspection; isn't that correct?

The Witness: No that is not correct. We did have such a form C.A.S. 4, which had nothing whatever to do with the charges to the contract on Mr. Zap's general ledger. Looking at one of those C.A.S. forms, No. 4, that is one of the typical forms that were used at the Zap plant, and that was: "The following documents are submitted herewith for audit;" that is correct.

By Mr. Lavine: That was not merely a request for inspection of the item for approval: I have seen hundreds of them. One of these C.A.S. forms number 4 is typical of the forms that were used at the Zap plant. It contained the [148] heading "Navy Department, Materials Division, Contract Audit Section. Documents submitted for audit from the office of Edward F. Zap, name of contractor. To:

(Testimony of Lucien Smith Minor.)

Resident Auditor," and "the following documents are submitted herewith for audit."

On the books of the contractor he would check them up from there, list them on here, and transmit it to us with supporting documents on it.

In the case of certain types of charges, this was submitted to us for inspection; in the case of overhead, there is nothing whatever of that material submitted to us. In the case of all cost-plus items, that is in all estimated contracts and in all cases where there was a cost-plus item, there was no transmittal sheet whatever in the case of overhead expense, which is an element of a cost-plus item.

In the early stages of the audit we did not have that form or anything resembling it; we developed that form and requested that form and requested Mr. Zap to put it into use, approximately in June of 1942. We discussed it with both Mr. Zap and Mr. Champlin. Mr. Zap signed all the vouchers, and did not delegate that authority to anyone.

I think I know Mr. Champlin's title, of controller.

We audited Mr. Champlin's pay accounts; Mr. Champlin did sign some of these C-4 forms, but not nearly all of them. I did not review all of these forms personally. Champlin did not sign all those that I personally reviewed; nor do I [148-a] remember the exact percentage as to what he signed. I did not audit all the forms personally.

This C.A.S. 5 form which I am shown is a true

(Testimony of Lucien Smith Minor.)

and correct type and copy of C.A.S. 5 form with some items from the Zap factory on it. There was also a 4-A form, which was used to resubmit to us anything that we had previously suspended for lack of supporting data; that is if something was not approved by Navy cost inspectors they turned the matter back to the contractor and asked him to submit supporting documents and so forth.

After receiving C.A.S. 4 form, if we decided it should be approved, we prepared a form entitled C.A.S. 5 which would be cross-referenced to the C.A.S. 4 number. It would indicate on there of the total original C.A.S. 4 such and such an amount is approved; the 5-A also being cross-referenced to the original C.A.S. 4.

If these supporting documents came forward, then the contractor was permitted to submit to the Navy cost inspectors again a number 4-A form, which was for resubmittal. This form then received an audit by us in the same manner as the C.A.S. 4. It was audited in accordance with our auditing standards, and we and our inspectors were satisfied with it when we got the form back for final submission on the basis of the information then available. We then submitted the C.A.S. 5 forms to the contractor.

Q. By Mr. Lavine: You submitted a 5 to the contractor. [148-b] Then if you submitted a 5 to the contractor, then and after that the contractor was permitted to file a public voucher or public claim; isn't that correct?

(Testimony of Lucien Smith Minor.)

By the Witness: He did not. We made the voucher ourselves. He had previously submitted the document to us, and after we got the 5, that was a notification that we had temporarily approved that amount and would prepare a public voucher in payment thereof. We prepared the voucher. He had submitted all the invoices, the supporting documents to us, with the C.A.S.-4, or 4-A, as the case might be. [149]

Q. By Mr. Lavine: Now isn't it a fact that the form of claim to the United States is in the form here of Exhibit 19, for identification, and here is an item "Sold to United States of America, contract No. 83142. We charge your account with direct charges, as follows:" isn't that the form that the claim takes before it is paid and before you make out your voucher?

The Witness: In some cases, yes, in others, not. We did not require that certification——

After I prepare a C.5 form and approve of the item, then an invoice is actually prepared and billed to the Navy, that was the practice of Mr. Zap's organization. I think in most cases the invoice would accompany the 4 at the time it was first submitted.

I also had a C.5-A form. A C.5-A form was C.A.S. No. 5-A. That was a form that I used where there was a disallowance or a suspension. Well, it would depend, Mr. Lavine, on the type of charge. As I told you before, we didn't require Mr. Zap to make an invoice in all cases. In some cases the

(Testimony of Lucien Smith Minor.)

vendor's invoice constituted sufficient supporting data. But in every C.A.S. 4 there would be attached to that what Mr. Zap at that time thought was sufficient supporting data to justify payment of the claim then and there.

Mr. Lavine: In connection with these various items mentioned in this Exhibit No. 19; for instance, I note that there was a certification by Mr. Zap and also that it was taken [150] before Leona Hanley, a notary public. No. 19, now, your Honor, I was referring to.

The Court: All right.

Mr. Lavine: I will offer these forms, your Honor, No. 4, 4-A, 5 and 5-A, as Defendant's next in order.

The Clerk: That will be Defendants' Exhibit R.

(The documents referred to were marked as Defendants' Exhibit R, and were received in evidence.)

By Mr. Lavine:

The Witness: This item here of June 29, 1942, of Government's Exhibit 22, in itself does not contain our identification. It isn't the copy on which we predicated payment; I think it was an additional copy. I think this was submitted on a C-4 form which either I or one of my representatives reviewed, or audited; that is the one about which I told you some time ago. We went up to see Mr. Zap to discuss it. As I recall it was not approved in the manner in which it was originally submitted. We did not send it back on a C-5A form, but just held

(Testimony of Lucien Smith Minor.)

it up until Mr. Zap submitted additional data to us relative to the propriety of the claim. I believe we then gave him a 5 form, if that procedure was in effect at that time. We probably would if the procedure was in effect. This was just an informal notification, however. After that we prepared the voucher. I do not know who did the typing on this particular bill.

I have never seen Mr. Zap typewrite. I was around the [151] plant I would say approximately once a week over a period of eight or ten months. It would vary from a few minutes to maybe two hours. I don't think I ever spent as much as a day in the plant at a time. I don't recall any instance in which I ever did. I assigned some of my men to do certain work. I didn't police it as to just how many hours they would be there. They made reports but they didn't say how long it took them to check it.

In connection with this item for $500, I would say I had my conversation with Mr. Zap in the latter part of June 1942; that is from memory and it may be off two or three weeks; I think it was in the morning. We went up specifically to see about this particular item which we had questioned the propriety of. By "we" I mean Hilton J. Byars and I; I believe several of Mr. Zap's employees were around the office at the time, including Mr. Champlin, but I don't believe Miss Boyle was working for Mr. Zap then.

Mrs. Hanley was working at that time. I wouldn't

(Testimony of Lucien Smith Minor.)

say positively she was in the office on that occasion. I did not become particularly friendly with Mr. Champlin during the time that I was going over there. I don't think I have ever been out to lunch with him. I would say I haven't. I could be mistaken, but to my recollection I never recall having been to lunch with him. As to having any discussion with him about the auditing system over there, we discussed from time to time certain things we thought they should do to [151-a] improve the system. Certain of those improvements which I suggested were put into effect in the Zap plant. As a matter of fact, I saw Mr. Zap from time to time when I came in there. We discussed this C.A.S. 4 and 5-A system with Mr. Zap. He was very heartily in favor of it at the time.

Mr. Lavine: I would like to read, your Honor, from the Contract 13, 83142.

The Court: Proceed.

Mr. Lavine: Section 4 of the contract. "Compensation. The Government will pay the contractor for the items called for in Lot 1 upon the submission of properly certified invoices, or vouchers, the prices stipulated herein for articles delivered, accepted and services rendered, less deductions as herein provided.

"The Government agrees to pay the contractor for item 1 of lot 2 the true cost as determined by the Bureau of Supplies and Accounts, in accordance with the Treasury Depart-

(Testimony of Lucien Smith Minor)

ment decision 5000, published in Volume 5 of Federal Register, pages 2788, 2797, as amended by T. D., for the balance of the articles and services called for in lot 2 the Government will pay the contractor the true cost as determined by the Bureau of Supplies and Accounts in accordance with Treasury decision 5000 published in Volume 5 of Federal Register, pages 2788 and 2797, as amended by T. D., $3,400, plus a fixed fee amounting to $2,975. Should [152] the true cost of furnishing tools and wings lots 2, 3 and 4 exceed the sum of $59,500, the contractor would be paid a fee when it did not exceed $2,975, but should the true cost of the tools and wings be less than $59,500 the contractor shall be paid a fee amounting to $2,975, plus 50 per cent of the amount by which the cost of furnishing the tools and wings fell short of the estimated cost thereof; provided, however, that the total fee to be paid the contractor was not exceeding a total of 7 per cent of the underestimated cost of the tools and wings, $59,500. The contractor shall to the extent of its ability take all cash and trade discounts, rebates, allowances, credits, salvage values and bonifications available to the contractor, and if unable to take advantage of any such benefits it shall promptly notify the Department in writing to that effect, and the reason therefor; in determination of the cost of articles and materials, for the purpose of

(Testimony of Lucien Smith Minor.)

this contract there shall be deducted from the gross cost thereof all such cash trade discounts, rebates, allowances, credits, salvage, plus commissions and bonifications, which have accrued to the benefit of the contractor."

The Witness: Now, in connection with this contract, I think I am familiar with the contract. And in connection with the terms of this contract and the Navy procedure, even [153] after payments are made under a cost plus basis, as to whether there is a frequent re-auditing of the various accounts made, if we find evidence that some of the items we originally paid are incorrect in any manner whatever, we will audit to the extent of attempting to correct those items. We reaudited some of the items in the Zap concern, and then charged them back again as a reduction of some of the accounts still due Zap.

Q. By Mr. Lavine: And isn't it a fact, that under the terms of this contract that not only is a re-audit—not only are frequent provisions made for charging back of these items, or in any event even after all the items are completed, that the total—that you make an audit to see if any more than 7 per cent is paid?

The Witness: If it had been necessary to do so, we would have. In this particular case the actual cost was far in excess of the estimate, so there was no occasion to check that point. The actual cost exceeded the original estimate made on the cost plus fee items. That, therefore, of course, would not

(Testimony of Lucien Smith Minor.)

leave any 7 per cent, or in excess of 7 per cent profit. We issued instructions to Mr. Zap and his firm, that in the event of any conflicts over interpretation of any of the terms of the contract, or of any items, there was a remedy which he had to take. This is one set of instructions about the appeal. I think that Mr. Zap had still an additional copy of instructions relative to the appeal. I believe we [154] did formally transmit to him a copy of appeal instructions to show the exact procedure.

Mr. Lavine: We offer this as the defendant's next in order, your Honor.

The Clerk: Defendants' Exhibit S into evidence.

(The document referred to was marked Defendants' Exhibit S, read and received in evidence.)

Mr. Lavine: Now, just getting back—if they may do something—the ordinary procedure on a fixed price contract is to pay the price when the work is done; isn't that correct?

The Witness: If a contractor had a fixed price item—on which he was to receive a fixed and definite price, I would not be concerned with whether it cost him half that price, or twice as much as that price; no, I wouldn't say it is entirely correct. For this reason, the contracts are subject to renegotiation, as a general policy. We are required to make audits for the Renegotiation Board. We were required to report the cost of the fixed items to the Bureau.

(Testimony of Lucien Smith Minor.)

Q. By Mr. Lavine: Now, in connection with the fixed price if the contract began—if he—if it costs him $10 and the fixed price is $2,000, he still gets the $2,000, subject only to the 7 per cent negotiation on the present claims; isn't that right? [155]

A. I hardly think it would be, Mr. Lavine.

Q. Well, is it right or isn't it right?

A. Well, I would say it is not right and I would like to explain it.

Q. All right, go ahead.

A. Because if we take an instance so absurd as that, such a margin of profit, we would report it to the Bureau, recommending that payment be withheld until such time as an investigation could be made. I am sure they would institute an investigation and recommendation to not make any payment whatever until they ascertained the reason for it. That is my opinion of the fixed price contract: I know of some instances in which this occurred in this particular contract. If the fixed price ran to several thousand dollars more than the fixed price, the contractor, instead of losing, would have the right to present his case to the Bureau and request an adjustment. I didn't say definitely that the contractor would lose, Mr. Lavine, he always has the right to attempt to renegotiate himself. I think it would depend on renegotiation of the conditions and the matter. If justified, consideration would probably be given to the contractor's request. In other words, under the terms of item one of this contract, the contractor was only permitted to do

(Testimony of Lucien Smith Minor.)

that if there was a renegotiation. I don't believe the 7% limitation of profit related to the fixed priced items.

The Witness: I am familiar with T. D. 5000. I think this contract was subject to T. D. 5000 as amended, and the [155-a] amendment did away with the profit limitation provision, so the limitation was subject to the Re-negotiation Board, that would be the only way that would come into being, the amount of profit, and they have no fixed amount that will allow—that they will allow—they will allow reasonable.

Q. And for that reason all of the books and items would be subject to reauditing.

A. I think the Bureau would reserve the right to audit the records. I believe somewhere within seven years you have to reserve it. And a contractor has to keep the records for that period of time. I think he is required either to keep them or turn them over to an authorized Government representative.

STUART ELDRIDGE WEAVER, JR.,

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maury:

I live at 345 Berwick Street, West, Los Angeles. I was employed by the defendant, Edward F. Zap.

(Testimony of Stuart Eldridge Weaver, Jr.)

on September 25, 1942. I remained so employed until November 6, 1942. I remember a Saturday upon which Mr. Zap left town. I remember having a conversation with him about that time. It was in Mr. Zap's back offices of his place of business at 1005 Broxton Avenue, West Los Angeles. I said nothing. Mr. Zap called me to a meeting in which Mr. Champlin, Mr. Handley, Mr. Kern, [156] Mr. Batos, Mr. Zap and myself were present, and announced to the gathering that he was leaving town next day for Washington, and for possibly several weeks, and during his absence I was in charge of the business, acting as Mr. Zap's own representative. Mr. Champlin inquired as to whether this was only technical affairs or business affairs as well, and Mr. Zap replied this meant everything, business and technical, essentially that was all that was covered.

That meeting was called just prior to noon on Saturday and the regular working hours were 8 to 12 on Saturday, and the meeting terminated in the forenoon, and the meeting just broke up and everyone went home.

I returned to work the following Monday. I took charge of the place, technically speaking. I made no charges myself, no. That morning Mr. Champlin asked what I cared to do about charging the time on project 15, which was a cargo ship proposal. I asked him what he meant by me charging the time. He said there was no ledger account in

(Testimony of Stuart Eldridge Weaver, Jr.)

the book for that time worked, or that work on that project, and they would have to be allocated to one of the existing accounts. I asked how this had been handled in the past and he said Mr. Zap ordinarily made the allocations himself, or directed Mr. Brown, who was the accountant, to enter the charges on such and such an account.

Later that morning—this was October 19, 1942—[157] later that morning I gave Mr. Champlin written instructions that effective October 22nd, which was the Thursday of the beginning of a new pay week, he was to have a new ledger account opened and all the time charged thereafter on—all time worked thereafter on project 15 was to be charged to the new account number. I believe I retained a copy of that written order, although I haven't had time to find it at home yet. That account was set up on the books: I don't believe it was set up on exactly the date specified, but it was within a few days thereafter. I know it was in operation by October 25th.

Cross Examination

By Mr. Lavine:

When I came there I said Mr. Zap put me in charge of [157-a] the plant, told me I was going to be in charge, not in front of all the employees, no, only those I have named. As a pure estimate I would say there were perhaps 20 to 25 engineers, maybe he has about 10 clerical help and men in the loft, and I have no way of knowing how many were

(Testimony of Stuart Eldridge Weaver, Jr.)

there, because that was in another building. In other words, the staff organization constituted about 50 to 55 people.

When I came over to Mr. Zap's plant, I came there at a loss. I came to Mr. Zap because I had worked for him before and I felt my chances for advancement were better with the smaller organization where I was known to the men involved. I am working now at Northrop Aircraft. When I came to Mr. Zap's place and he turned the place over to me, he gave me no instructions whatsoever as to how to charge anything. He left it entirely up to me to handle. Mr. Champlin was the controller there at the time that I went in. Mr. Brown was handling the books and accounts when I was there. Entries in the books were made by Mr. Brown, who was, I believe—I believe Mr. Brown was a member of an outside auditing firm and simply employed by the Zap organization as a part time employee to make the entries in the books. Mr. Champlin made out the items of account.

In connection with Project No. 15, Mr. Zap never told me to make any charges on Project 15 in any way, shape or form. He never told me to enter them in any accounts, in any way, shape or form. After Mr. Zap announced that I was [158] to be in charge there, Mr. Zap then left for Washington the next day. The plane had gone on ahead, being flown across the country by Mr. Dale, and Mr. Zap was going east in order to be in Washington when the plane arrived there. Mr. Zap left Los Angeles

(Testimony of Stuart Eldridge Weaver, Jr.)

on Sunday, October 18, I believe, on Monday morning, October 19th, Mr. Champlin asked me to come out for a cup of coffee—pardon me—I am in error—first Mr. Champlin asked me what I cared to do about charging the time worked on Project 13.

Stuart Eldridge Weaver, Jr.,

called as a witness by and on behalf of plaintiff, having been previously duly sworn, was examined and testified further as follows:

Cross Examination
Resumed

By Mr. Lavine:

Q. Did Mr. Champlin and you have some difficulties over your draft status?

A. Slight difficulties, yes.

Q. Just state what occurred.

A. At my request, Mr. Champlin, shortly after Mr. Zap left, started to bring into the office the agents or representatives of the Government. Mr. Champlin made statements to me which I wanted to find out the truth of, which were derogatory to various employees, and derogatory to Mr. Zap.

Q. Did Mr. Champlin try to get you inducted into the [159] service so you would no longer be manager of the Zap organization, after Mr. Zap installed you?

(Objection by the Government sustained.)

The Witness: When I came in there as Manager of the company, Mr. Champlin had a typewriter; he

(Testimony of Stuart Eldridge Weaver, Jr.)

did typing. Miss Edwards was the telephone switchboard operator. I believe she did some typing. And Miss Boyle typed. The accounts were under the supervision of Mr. Brown. Miss Boyle helped him; perhaps. I knew Mr. Brown to be a certified public accountant. The last pay check was issued on October, the last Saturday or the last Friday in October, I forget the date. October 23rd or somewhere along there; that would be the next to the last Friday in October. Several of the employees stayed on after that without pay; most of them did.

Q. By Mr. Lavine: Did they write a letter expressing their confidence in Mr. Zap at that time?

Mr. Maury: Objected to as immaterial.

The Witness: I worked on Project 15 for a total of about four hours. This was during the daytime.

[160]

Los Angeles, California, Monday, April 12, 1943, 10:00 A. M.

LUCIEN SMITH MINOR,

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Cross Examination

That is the bulletin I sent to Mr. Zap in connection with the manner of readjusting claims in which there had been a dispute between the cost inspector and the Government inspector and any contractor.

(Testimony of Lucien Smith Minor.)

It is the procedure to be followed on appealing to the Navy Department.

The Clerk: Defendants' Exhibit U in evidence.

(The document referred to was marked as DEFENDANTS' EXHIBIT U, and was received in evidence.)

"Office of the Cost Inspector
U. S. Navy
Douglas Aircraft Company, Inc.
9130 Wilshire Boulevard
Beverly Hills, California
31 July 1942

From: Cost Inspector.

To: Edward F. Zap, 1005 Broxton Avenue, West Los Angeles, Calif.

Subject: Procedure for Appeal and Review of Disallowed Items of Cost.

Reference: (a) Cost Inspection Bulletin Gen. 10-42, [161] L10-6/JJ/L4-3, (CIM), EN9-5. dated 12 May 1942.

Enclosure: (A) Copy of reference (a).

1. A copy of reference (a) is forwarded herewith for your information and guidance. In the event that you desire to protest any of the items disallowed by the Cost Inspector as an element of cost, it is requested that the procedure outlined therein be observed.

(Signed) L. S. MINOR
L. S. Minor
Ensign (SC) USNR"

(Testimony of Lucien Smith Minor.)

"Navy Department
Bureau of Supplies and Accounts
Washington, D. C.

12 May 1942

To: All Supervisory Cost Inspectors U. S. N.
All Cost Inspectors U S N

Cost Inspection Bulletin Gen 10-42

Subject: Procedure for appeal and review of disallowing items of cost.

Enclosure:

(A) Outline of Procedure for Appeal and Review Brief for Disallowed Items of Cost.

1. The procedure outlined in enclosure (A) should be adopted in any case where the contractor believes that [162] the Cost Inspector has erred in disallowing an item of cost and desires that an opinion relative thereto be rendered by the Cost Inspection Division, Bureau of Supplies and Accounts. In order that the proposed procedure may function effectively and the contractor be adequately informed with respect to the methods adopted for submitting a statement of facts for decision, the cost inspector is directed to discuss with the contractor the contests of this bulletin and perfect a procedure that will expedite the preparation and submission of briefs.

2. It is not intended that briefs be filed in the cases where the Cost Inspector and the

(Testimony of Lucien Smith Minor.)

contractor have not had a meeting of minds as to the statement of fact. Neither is it intended that items held in abeyance or suspended by the Cost Inspector for further consideration be the subject of an appeal. Only those items which have been considered and disallowed by the Cost Inspector and which in his opinion violate the terms of the contract or the cost principles applicable thereto should be appealed. It is therefore imperative that briefs be filed only if, as and when a fundamental difference cannot be settled amicably by the Cost Inspector and the Contractor. This does not mean, however, that the Cost Inspector should be lax in enforcing the contractual provisions as interpreted by the Cost Inspection Division [163] in determining the reimbursable items of cost.

3. No printed forms will be provided by the Cost Inspection Division for submitting briefs, although the form, including headings, indentations, and sectional divisions as indicated in enclosure (A) should be followed, using plain white paper, heavy for the original and thin for the copies.

4. Ordinarily a brief should contain only similar or identical principles requiring a decision; for example, allocating overhead cost items, pricing of raw materials, or composite depreciation rates should not be combined in one brief, because a decision in connection with

(Testimony of Lucien Smith Minor.)

overhead costs may be in favor of the contractor while the raw material pricing decision may sustain the Cost Inspector, and, since the principles are being interpreted, it does not appear advisable to attempt to make the brief a historical document or an All-inclusive Résumé of all items disallowed under a contract. It is therefore directed that each brief filed should contain only relevant items applicable to the principle involved.

5. This procedure should not prevent the usual exchange of correspondence with the Bureau in connection with interpretation of contractual provisions and other documents, including the Cost Inspection Manual.

6. Five official copies of the brief should be pre- [164] pared and distributed as follows:

Original and duplicate to Cost Inspection Division.

Triplicate to Cost Inspector.

Quadruplet to Contractor.

Quintuplicate to Supervisory Cost Inspector.

7. In the event of a decision by the Bureau, which is adverse to the contractor, the contractor has a right to appeal to the Compensation Board of the Navy Department for a review and hearing.

(Signed) FRANK BALDWIN

By direction of Paymaster General."

(Testimony of Lucien Smith Minor.)

Mr. Lavine: Attached to this are Appeal and Review Brief Forms, stating the manner in which all these items should be taken up, and the matters involved, the prices involved, and the question of disputes between the contractor, the Cost Inspector, supervisor cost inspector, and so forth, and provides any exhibits, and for a review of all those matters by supervisory officers, which is in evidence.

The Witness: The other day we went over all the C. A. S. 4 forms and each of these C. A. S. 4 forms have this substance in them. Form C. A. S. 4 on the top "Navy Department. Material Division. Contract Audit Section. Documents submitted for audit. From office of Edward F. Zap, name of contractor, to resident auditor, the following documents are submitted herewith for audit, list or number, the inspector, the number, the date, the vendor, the amount." [165] Below is a place for signature of the resident auditor, with reference to the amount, and so forth.

(The document referred to was received in evidence and marked Defendant's R.)

The Witness: When I got through submitting C-5 form to the contractor approving of certain things that I inspected, I would then, at a subsequent time, receive an invoice for that work. Not in all cases—for the reason that in—for certain types of charges the necessary invoice, and so forth, would, I believe, be submitted with the Form C.A.S. 4, that being the first. There was always an invoice

(Testimony of Lucien Smith Minor.)

with it, regardless of whether it was submitted with C.A.S. 4 or C.A.S. 5; either a vendor's invoice, or an invoice from Mr. Zap, something to support the charge.

There have been occasions where items have been allowed, and later on we made readjustment by charging it back to the contractor. I don't recall any, but probably there have been items of that type. And there is always a retention, a certain percentage of the money by the Government before final payment; not of his cost. A part of his fee is held up until after final acceptance, but his cost, no. I believe there is a part of his fee held up right now, pursuant to that regulation and general procedure.

When I went into Mr. Zap's office, he had a comptroller and a bookkeeper there handling the accounts and things. For a part of the time I believe that is the case. [166]

I know Cedric Brown, a certified public accountant. He helped to audit the books. I don't think he made out the bills. I think he only made up the statements at the end of the month. That is my recollection of his duties. I have seen him there on a number of occasions. I don't recall ever discussing any item in particular with Mr. Brown.

Cross Examination

By Mr. Balter:

This cost inspection service has been in effect, I believe, since July, 1940, when it was first placed

(Testimony of Lucien Smith Minor.)

into effect. That is approximately the same time that the cost plus fixed fee type of a contract went into effect. I think they actually started cost inspection in the field probably around July, 1940. As a matter of fact, most of the contracts in this area were fixed price contracts, until sometime in 1941. From what I have heard I think that is the case, though I don't know actually. And only until after sometime in 1941 did the Navy Department modify the situation so that there were some cost plus fixed fee items, and also some fixed price items in the same contract. Well, that is the only contract I have ever seen of that nature where one item was fixed price and one cost plus.

I am connected with the cost inspection service, which is a part of the Bureau of Supplies and Accounts of the Navy Department. There is a Bureau of Aeronautics in the Navy Department. The material inspectors and the inspectors such [167] as Lieutenant Commander Scott are under the jurisdiction of the Bureau of Aeronautics. He was not a part of the cost inspection service with which I am connected. As far as inspection services of a contractor are concerned, my duties and the duties of the materials inspector are, I think in many cases, quite similar. It is up to the technical inspector to see that it is in order to purchase that particular material for a contract, and it is acceptable as to quality, prices, and so forth, and if the cost audit did the invoice for the particular purchase,

(Testimony of Lucien Smith Minor.)

and it was approved by the cost inspectors, as being necessary, then we would audit it as to correctness of amounts, and so forth, and reallow it as costs.

We review the items and determine if they are eligible as an item of cost under the terms of the contract all the way through. By that I mean that we determine whether the contractor has expended the items which he claims he has expended in his application for payment; that is one step in it. The inspection services of the Bureau of Aeronautics are concerned with whether or not materials could be purchased under the contract, and then after their purchase whether or not the work is according to the specification and satisfactory; as to the reasonableness of prices.

I am primarily interested in the auditing phases of the contractor's books and his right to payment. On the question of determining whether or not the cost-plus items [168] of a contractor's transactions entitle him to payment, that is primarily my concern; I mean my service, though we rely on advice and assistance from the technical inspector in many, many cases. If a special type of work or test is being conducted under a particular contract, we would certainly rely on the technical inspector to say whether that is necessary and in order and in accordance with the contract.

For example, if they conducted a wind tunnel test we would certainly rely on the technical inspector to say whether a wind tunnel test was made under the contract. It is our concern to ascertain that

(Testimony of Lucien Smith Minor.)

the amount he charged us represented what he paid, though I think it is still the primary responsibility of the technical inspector to determine that the costs are reasonable. I think that is substantiated by directives issued by the various Bureaus. I do not have those directives with me. I think there are some available.

Now on the question of whether or not certain items should or should not be charged to a contract, it is true that there are many instances where a twilight zone of doubt exists as to whether items can or cannot be charged to a contract. Particularly in the field of whether or not items should be charged to the contract or be considered capitalization items. I don't think there are too many. I think the rules are pretty definite as to whether an item should be capitalized or charged to a contract. [169]

Q. By Mr. Balter: Where a contractor is engaged in experimental contracts and he has only a single contract, or only, say, one or two contracts, isn't it an important problem to determine whether or not a particular item shall be considered a part of the overhead charges for the contract, on a cost-plus fee basis particularly, or whether you would consider it as a capitalization charge?

The Witness: I don't think the fact that a contractor is having one contract would have any bearing on the case at all.

Q. Well, wouldn't it have a bearing on the situation where you had a contractor who had an as-

(Testimony of Lucien Smith Minor.)

sembly line production? Wouldn't it be much clearer than to determine whether or not items are chargeable to capitalization or to the contract than it would be in a case where a contractor has one or two contracts and doesn't anticipate other contracts and must buy certain things to keep his plant running, which may not very clearly be chargeable to the contract as it would be in a case of a contractor having many contracts?

The Witness: The test as to whether it is going to be capitalized or not should be the use for life of the particular item in question. That is a matter of interpretation; naturally, interpretation enters into it, but I think the regulations are reasonably definite on that score. Treasury Decision 5000 acts as our guide in many of those decisions. That was the original document on which the costs were to be [170] determined, but we have had literally dozens of directives supplementing, and in some cases superseding Treasury Decision 5000. The Comptroller General has issued others. The basic problem is still the same; that in many of those items it becomes a problem of interpretation which may not be ultimately decided by me at all; undoubtedly, yes. The procedure is set up so that they can appeal if they don't agree with us.

Q. And isn't it the experience of a great many of these war ~~contracts that~~ the door is left open for almost constant readjustment between the contractor and the Government from today on; isn't that correct?

(Testimony of Lucien Smith Minor.)

Mr. Binns: Your Honor, I object to that question.

The Court: Sustained.

Mr. Balter: Very well, I will withdraw the question.

The Witness: As to the fixed price items of a contract, it is a fact that concerns primarily engineering and drawing work in this particular contract: principally the items. That is true of both contracts. 83142 and 4105; I think that is generally what it covers. It is a fact that as far as engineering and drawing data is concerned the Bureau of Aeronautics receives all the drawings and all the engineering data and passes upon its correctness and its applicability under the contracts. They would, I believe, review the blueprint and determine whether it is applicable.

I don't know whether it is a fact that they receive all [171] the drawings and all the engineering data with respect to fixed price items on a contract: particularly these two contracts. That phase of it is not a concern of my inspection service; not as to the disposition of the blueprints. The correctness of the amounts charged to the fixed price items are a concern of ours, because we are required to report to the Bureau of Supplies and Accounts the actual cost of those fixed price items, the amount of profit the vendor made on them. Even on the fixed price items in contracts the Government is interested in determining whether or not the profit is too big or too small, definitely.

(Testimony of Lucien Smith Minor.)

Q. It is a fact that even in a fixed price item of a contract it's never really fixed?

A. There are statutes which provide for the renegotiation of fixed price contracts, if the amount of business which a contractor does with the Government exceeds, I believe, $100,000 a year; and if the Navy Department was so inclined I think they could renegotiate the contract.

I think Mr. Byars did confer with Mr. Butler, the engineer employed as a civilian engineer for the Materials Inspection Service, as far as the engineering data is concerned in these contracts, on several occasions. It is a fact that we also discussed those items with Mr. Hartman, a civilian inspector. Only when there seemed to be some question in our minds would we discuss it with Lieutenant Commander Scott.

Mr. Lavine: May I ask a few questions before the [172] Government resumes, your Honor?

The Court: All right.

Q. By Mr. Lavine: Referring now to Government's Exhibit 19, for identification, a public voucher No. 3062, an item "Preliminary Number, 40," an item for, $4,300, October, 1942," other direct charges, $4,300"; do you know the signature of Commander Smith? A. Yes, I do.

Q. Is that the signature of Commander G. A. Smith on there? A. Yes.

Q. "Commander, Retired, Naval Aircraft"?

A. "Inspector of Naval Aircraft".

(Testimony of Lucien Smith Minor.)

Q. "Commander, USN, Inspector of Naval Aircraft," is that correct? A. Yes.

Q. And is that your signature, "October 15, 1942, L. S. Minor, Ensign, USNR"; is that your signature? A. That is right.

Q. And you signed it on that day and date, did you, October 15, 1942? A. That is right.

Mr. Lavine: I will read that to the jury.

"I/we certify that the foregoing is the actual cost and that the services have been performed or material delivered in accordance with the contract. G. A. Smith, [173] Commander USN, Inspector Naval Aircraft; L. S. Minor, Ensign, USNR."

Q. By Mr. Lavine: Now in connection with voucher 280-B, "Preliminary Number, No. 1—" is that correct? A. That is right.

Q. Voucher dated——

Mr. Maury: Which exhibit is that?

Mr. Lavine: This is Government's Exhibit No. 30.

Q. By Mr. Lavine: Dated July 3, 1942, "contract NXs 4105, requisition No. 315-42." Then there shows on here, "General and Administrative Expenses." After that "Schedule C, $1,675.81." And below that, is that the signature of Commander Smith? A. It is.

Q. And is that your signature right next to it, on the other side of it? A. It is.

Q. Dated July 3, 1942, is that correct?

(Testimony of Lucien Smith Minor.)

A. That is right.

Mr. Lavine: "We certify that the foregoing is the actual cost and that the services have been performed or materials delivered in accordance with the contract."

Q. By Mr. Lavine: Now this schedule C which is referred to was attached at that time, was it? "Schedule of Direct Charges."

A. Yes, I think it was. [174]

THOMAS CEDRIC BROWNE.

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows: [175]

The Clerk: Your full name, please?

The Witness: Thomas Cedric Browne.

Direct Examination

By Mr. Maury:

I reside in Los Angeles. My place of business is in Santa Monica and Westwood Village. I am a certified public accountant. I am acquainted with Mr. E. F. Zap. During 1942 I had occasion to do some work for him. During the year 1942 I was in charge of the accounting work for Mr. E. F. Zap, and then I prepared financial statements, as is the usual thing, at the end of each month, and supervised the bookkeeping and accounting of his firm. I supervised all of them. That is, they were under my

(Testimony of Thomas Cedric Browne.)

direction. That is the setting up of the general ledger and the job cost ledgers, and so forth. They were under my supervision through the bookkeeper he had, in conjunction with his controller, Mr. Champlin. That was in connection with his business at 1005 Broxton Avenue.

The system that I set up was a job cost ledger system in connection with the contracts which he was doing for the United States Navy. In other words, we set up that job cost ledger system in order to conform with the various items of the contracts, to keep them segregated as we went along during the course of the work.

If I remember correctly, there were two contracts being worked on during 1942, contract 83142, and then a [176] contract known as NXs 4105.

Calling my attention to Government's Exhibits 4 and 3, these are the documents I have referred to. I am not too familiar with them, because of the fact that I was in charge of the accounting part of the work, and these contracts were referred to me just in order to determine the number of items and so forth in setting up the books. I never have read the complete contents of any of the contracts, naturally, and I just obtained the item numbers and the amounts from these contracts in order to set them up in the job cost ledger so that we would follow through the procedure that was necessary in keeping track of these costs between the Navy auditing department and the accounting department of E. F.

(Testimony of Thomas Cedric Browne.)

Zap. It was my view in the designing of this set of books to have them parallel or reflect items in those contracts. It was from those contracts that I evolved the system.

I came into the picture, you might say, in, roughly, November of 1941, when I was called in jointly by Mr. Zap and the Security-First National Bank of Los Angeles, for a balance sheet to be prepared at that time, inasmuch as that was the bank which was loaning him money from time to time, and they hadn't been able to secure a satisfactory financial statement for their purposes. So I came in at that time and went over the books and made an audit and prepared a financial statement for the bank. At that time I made certain recommendations. And then I was not called in again until the [177] end of the year, some time in January, to prepare Mr. Zap's income tax statements for 1941; and a little later on the accountant who had been in charge was dismissed, or left, I don't know just—wasn't in the picture any more, and I was called in then to prepare monthly financial statements, which I did during the months of January, February, March, April, May and June. That is all 1942. Those were a balance sheet and a profit and loss statement, as customary in any business.

Along about May, June or July, somewhere along in there, I would say about that time, the books had become so involved, so to speak; that is everything up until that time with regard to these contracts

(Testimony of Thomas Cedric Browne.)

was thrown into one account, both the income and the expenses, and there was no division as to whether they were fixed price divisions of the contract or cost plus, and it was pretty difficult, I am sure, for the Navy auditing department to try to make a reasonable audit of those particular accounts; therefore, Mr. Zap asked me if I would spend more time on this particular job than I had been; in other words, instead of coming in just at the end of the month he wanted me to come in periodically, as often as necessary in order to establish a more satisfactory system.

So it was then that I went down to the Navy auditing department and asked them along what lines would they want a system established which would give them more information in auditing these contracts, and in conferring with some of [178] the men in the Navy cost department we evolved this system of a job cost ledger which would give sufficient detailed construction of these accounts so that they coud be audited more easily. I numbered these accounts.

At that time we went back to, I believe, May 1st of 1942, and proceeded to break down the two accounts which were in the general ledger of these contracts into the various items of the contracts, and we called—I believe I am correct—we called Contract 83142, at the suggestion of one of the men in the Navy Department, job No. 25. It had previously been referred to as Job No. 90, I believe.

(Testimony of Thomas Cedric Browne.)

25. And then from that we went down the line and each item was 251, 252, 253, and so forth.

That is my present recollection as to Contract 83142.

Then I believe on NXs 4105, I think we gave that 26; and that was 261, 262, 263, and so forth.

I remember accounts commencing with the number 3. No. 3 was the one that we gave to 83142. 25 and 26 was NXs 4105; 25 being, I believe, the cost plus, and 26 the fixed price; or it might be vice versa. I am just talking from memory, of about 6 months back. You must realize I haven't seen the books or anything since last November.

Q. Calling your attention to this group of books and cancelled checks here which I now indicate, are these those books which you have described?

A. May I go down and take a look at them, sir?

[179]

Mr. Maury: Yes, surely.

Mr. Lavine: May we approach the bench?

Mr. Maury: Will you look them over while we are discussing the matters at the bench?

The Witness: Yes.

(Discussion outside hearing of the jury:)

Mr. Lavine: The Government is now coming to matters which we have heretofore, before Judge Yankwich, contended were unlawfully seized, without proper search warrant, and so that our record may be preserved and carried out, we at this time move the Court to suppress all of these forthcom-

(Testimony of Thomas Cedric Browne.)

ing documents and records, the checks, the books of account, and all records, as having been unlawfully seized, without authority, and in violation of the 4th and 5th amendments of the Constitution of the United States. That will save my repeating after each item as offered, and may I make that motion collectively as to all of these now being offered at this time and regarding which this auditor will be asked questions, so that my objections and my motion may be deemed as to all of these matters? And we ask at this time not only that they be suppressed but that they be returned to their owner, E. F. Zap.

The Court: I think it is advisable to approve Mr. Lavine's suggestion there, because I think it might be prejudicial for him to make that motion before the jury, and also to renew it after each one of these are offered, so [180] let the record show that the objection made by Mr. Lavine will follow each of the offers of the books and records and checks that the Government now proposes to be identified and offered in evidence through the witness who is now on the stand. The motion is overruled and the exception is allowed to the defendant Zap on each and every one of the exhibits that are about to be identified and offered in evidence. Is that satisfactory?

Mr. Maury: The Government has no objection to the procedure and wishes to stipulate thereto, and, of course, resists the substantive motion on the grounds heretofore set forth. [181]

(Testimony of Thomas Cedric Browne.)

Los Angeles, California, Monday, April 12, 1943.
2:00 P. M.

Thomas C. Browne,

called as a witness by and on behalf of the defendants, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination
(Continued)

By Mr. Maury:

I have looked over these books and records.

Q. By Mr. Maury: Now, can you step down from the stand and you may come over here and explain to the jury, briefly, what each one of these is, if you know. Starting——

Mr. Lavine: All this testimony is subject to the general objection and exception.

Mr. Maury: Sure.

Q. By Mr. Maury: Starting here and going away down there. A. This is a check book.

Q. That is marked for identification on the front Exhibit 34 for identification. Explain what it is.

The Witness: It is the business check book of Mr. Edward F. Zap at the Security First National Bank of Los Angeles, in Westwood. The check stubs are numbered consecutively. They were originally issued by the bank, one, two and three, and 600 is the last number. Every one of these when drawn, the checks bear the same number. [182]

Exhibit 35 are bank statements of the account,

(Testimony of Thomas Cedric Browne.)

this account of Edward F. Zap at the First National Bank, Westwood. They were reconciled there by me or under my direction, to see that the reconciliation agreed with the general ledger.

The next exhibit of these here, entitled "group 36 for identification", are memoranda checks that were not drawn over here, but written on the same bank account.

This Exhibit 34 was written by Mr. Zap and each recorded at the end of the month when they came to the bank; he possibly didn't know about them until they were entered there at that time. That is the procedure on that type of checks.

This is 37; these here checks correspondingly numbered; that is, for instance, this check book, this one, these checks right here, 301 to 555 correspondingly numbered with the check book over here, in Exhibit 34.

These checks now numbered 2501 and go on through 28 and so on up, are the type of a check that we began in July, the first check was 611, July 15, 1942. This is what is called a voucher check, the bottom part of it being a description of what the check was written for, a copy of the check being attached to the invoice, and a third copy of the check being kept in numerical order in the files of Mr. Zap for the purpose of reconciling the bank account at the end of each month. They were on the same account, which is a change in the type of check in order to give us more adequate records.

(Testimony of Thomas Cedric Browne.)

They were reflected also by Exhibit 35, the bank statements. [183]

Now, this exhibit is a large book, marked 38 for identification. That is what you might call, what you do call, the book of original entry of all the transactions of Edward F. Zap in his business. Here is the cash received and that was entered in the cash deposited in the bank and credited to the particular account if they had been paid to Mr. Zap. The second tab is check record and into that was written the number of the check and the payee from these check stubs over here, corresponding with them. Indicating Exhibit 34.

Your next one is the invoice record, which is the usual type of record in which credits to the business for accounts payable are entered and they are charged, of course, on the account of the general ledger, or against the particular contract. The next tab is entitled payroll, and this was discontinued in the early part of 1942, because of the fact that we run the payroll then through this check record book here, along with all of the other checks. The last tab is the journal, which is the general journal for adjusting entries at the end of each month, or as time went on until the time any particular entry up here might not have been charged properly. This adjusting journal was used for that purpose.

"General Ledger," and marked 39 for identification, is the general ledger and is the book of final

(Testimony of Thomas Cedric Browne.)

entry from which the postings were made from these various journals in here, the cash received, check record, the invoice record, and the journal, when they were totalled up they were posted into [184] these accounts in here, in the general ledger of Mr. Zap. This is a ledger used in practically every business containing assets or liabilities, and no investment and revenue accounts, and the expense accounts to Edward F. Zap. The posting of that was made from 38 to 39, the original entry.

The next one, his red leather covered book which is marked Exhibit 40 for identification, is the payroll book in which we broke down the weekly payroll and charged it against the overhead accounts for the various job costs accounts before being totalled, and then being placed in the check record over here. This book was not made under my supervision and direction.

These entries were made, for instance, this particular writing—to June 12, 1942, is in the writing, I believe, of Mr. Champlin; that is prepared by him, this breakdown, and that was the basis on which he paid the employees.

Mr. Lavine: May I inquire?

The Court: Yes.

Q. By Mr. Lavine: Mr. Browne, Mr. Champlin didn't do that work under your direction, did he? He did that work but not under your direction?

A. Not under my direction. He knew that was the way in which I wanted it done, but he—because

(Testimony of Thomas Cedric Browne.)

when anything came up in bookkeeping, along that line, or the accounting line, the procedure, Mr. Champlin usually conferred with me as to how I would want that done so it will appear in the [185] final books of account.

Q. By Mr. Lavine: This was the system that was carried on in the Zap place of business?

A. That is correct.

Q. Mr. Zap personally did not directly issue the one check for $2,000, did he?

A. No, except that his signature was on the check.

Q. You handled all the accounts? You gave all the directions for the audit account; is that right?

A. Yes, sir.

The Court: All right. Proceed.

Q. By Mr. Maury: Now, calling your attention to the Government's Exhibit No. 41, I believe it is, for identification. Will you explain that to the Gentlemen of the Jury?

A. This is the job cost ledger which I tried or started to explain the first thing this morning, and got mixed up in my dates. It starts here and here it is out here in these indexed tabs 3 zero, 37, 38——

Q. Those account numbers?

A. Yes, they are account numbers. They were in the—had the same number on each of the files, and this is an identification of the previous breakdown, this here, they are intended to mean here various items in this particular contract so we might keep them all separate. Contract 83142, which was

(Testimony of Thomas Cedric Browne.)

entitled No. 3, and then zero 7, 8, 9, 10 and 15, corresponding to the different items appearing in that contract. [186]

And following that we have these, 261, 262, 263, 264 and 265, which are items of the contract NX-4105. In these particular instances the zero indicates the cost plus of the contract.

It is true also of the items under 83142.

This particular cost ledger does not have a name on the face of it, but is intended to be the cost plus portion of the contracts.

Exhibit 42, the job cost ledger, is under a fixed fee. That fixed fee could be fixed fee or price cost. It is referred to as one or the other.

In this ledger we have 2500, 2501, 2502 and 2503, which represents the items which are fixed price portions of the contract. The number in NX-4105 they used 25 as the beginning, you see, for the fixed price items; No. 26 for the cost plus items in the contract. Take here, we have No. 311, which is a fixed price portion of the contract 83142.

Exhibit 45 consists of various pages of original entry, similar to what there were that we find over in Exhibit 38. These were taken from this particular book when we had no previous use for them at that time; that is, they are of the previous years 1940 and 1941, so that when we came to 1942, it was no longer necessary to keep them, so we took them out and filed them here and continued the account of the 1942 records. [187]

(Testimony of Thomas Cedric Browne.)

In this book there is an account entitled Account No. 50-0. This account number, 50-0 refers to the payroll at the factory plant Mr. Zap had on Westwood Boulevard, that is, to the overhead payroll at that particular plant, to differentiate it from the ordinary office overhead at the main plant. That account was in here and apparently has been transferred by journal entry to the account designated 200 in Exhibit 30 for identification, which page is entitled "Factory Ledger Plant No. 2."

I made the journal entry with respect to that myself; here in the general ledger is where it is transferred; that is, account No. 11, Sheet 11, work-in-process charged to the general ledger. That was transferred out of 200 account in here in the general ledger, and this account here, you will observe it is made October 31. That was the last day of the financial statement and I believe it was the intention then to open up in one of our job cost ledgers on account entitled "50-0." That had not been done at that time. It shows in here in the column "50-0," not job cost ledger.

This journal entry on page 62, to which I have just referred, which is in my handwriting, was a transfer from what we called the factory ledger, which we were in the process of opening at that time, and under this direct account 200, into this work-in-process, so that we might have all the payroll under one control. [187-a]

What the factory overhead actually was, was 200-

(Testimony of Thomas Cedric Browne.)

50 and 200-51; I am a little musty of that, but those last figures were the account numbers for the overhead marks. Looking at this entry, I see October 23 says: "Project 75, 50-0, 1346," and on the 30th "Project 75, 15-0, 183." I now recall a conversation with Mr. Weaver.

Thus this was transferred into the 50-0 account from the account 200 by the journal entry, which I made.

This was then posted to the control account in the general ledger, but as of October 31, had never been put in the job cost ledger.

The new system of books which I mentioned was set up as of the accounting date of May 1, 1942: we break down our account as of April 30 and made this new set up on these particular sheets, which consisted of the job cost ledger and the job cost ledger fixed-fee.

In doing so we did not go back over the entire set of accounts under these two contracts and make all entries, let us say, backwards, or re-set them up: or re-break them down. We merely took the totals that were in the control account and broke them down as well as we were able to. Up to that time the contract 83142 had been one account, and we tried to analyze that and break it down into various items according to the contract by total, not by individual postings clear back.

Calling my attention to Government's Exhibit 34, or rather may I have the previous one—I think it is

(Testimony of Thomas Cedric Browne.)

32—yes, it is 32 for identification. This is a tab of stubs, [187-b] or bank check stubs, which preceded the Government's Exhibit 34 for identification.

Q. Now, let's turn to check No. 2679. I call your attention to Government's Exhibit 7 in evidence. Are you familiar with that check?

A. That appears on check record 58.

Q. Just a minute. Doesn't it appear on check record 57?

A. Let me see. Yes, it appears on check record 57, under the 2629.

Q. What is the date of that?

A. Well, between the 23rd and the 25th. There is the 23rd on the check and it would be in here, 23rd in here. In brackets afterwards in the—where you have it it says "see October."

Q. And then turn to "see October." Do you find it again?

A. Yes, it is the first check appearing on check record 58 in the amount of $4,000, from 2629, and under the date—it has 9-23, the same words as on the check.

Mr. Lavine: This particular item, the record shows particularly as to my special objection made yesterday——

The Court: Let the record so show. What is the number of it?

Mr. Maury: 2629, and the exhibit number is 7 in evidence. [188]

The Court: All right.

(Testimony of Thomas Cedric Browne.)

The Witness: That is made payable to William H. McAvoy and appears under 3-15, is the designated item of the job cost ledger.

Q. By Mr. Maury: Where does it go from there?

A. It goes into the job cost ledger under 3-15, page 1, and it appears under two datings, one of October 2nd and then followed by 9-23; William H. McAvoy, showing it came from check record 58; it appears under the other charges as a sub-head of direct charges on that particular page.

Q. Indicating that has been charged to account number what?

A. Account 315 of flight test portion of the contract 83142.

Q. Does that indicate whether these were reflected as paid by the Navy or not?

A. Yes, there is—this line drawn along here indicates it has been paid by the Navy, under the date paid.

Q. You have no independent recollection of this particular check, Mr. Browne?

A. In what way do you mean?

Q. Its issuance?

A. The reason for it being—well, this had been issued to Mr. Zap in blank, and that is the reason it was not entered until October, because until that time we didn't have the amount of the check. That is about the only thing. [189]

The Witness: I have been in the accounting busi-

(Testimony of Thomas Cedric Browne.)

ness over 16 years. I am a certified public accountant under the laws of the State of California.

I am familiar with Government's Exhibit No. 16 in evidence; one of those two documents was the original and the other is a duplicate of an invoice from the University of Washington for "work not previously billed, done up to and including July 31, 1942, in the wind tunnel." I have seen that before, approximately during the first ten days of September of 1942. To the best of my recollection, Mr. Zap gave them to me, and at that time I had a conversation with Mr. Zap. I asked Mr. Zap himself, what jobs this would be charged to and he said, "Well, just hold it in the file at the present time and we will decide later, because there are so many items on here it would take a little work in order to figure it out, which contract and jobs they were to be charged against."

I had another conversation with Mr. Zap regarding those, which was approximately September 17, 1942. I can refresh my memory of this by looking at the document of the invoice record in Mr. Zap's books, Exhibit 38 for identification, because of the fact on September 17th, I entered the invoice in there, having at that time secured from Mr. Zap the breakdown of the charges for this particular invoice.

Q. By "breakdown," what do you mean? [190]

A. I mean this was broken down into the two contracts, the NXs 4105 and 83142.

(Testimony of Thomas Cedric Browne.)

Q. You are indicating these figures on the bottom of the second page? A. Yes.

Q. In ink? On this exhibit, this Exhibit 16 is 16 in evidence. Do you know what this first column indicates?

A. The 3-0 on the top indicates this contract, 83142.

Q. And 200, the second column?

A. That indicates NXs 4105.

Q. Do you know whose handwriting this is?

A. To the best of my knowledge, that is Mr. Zap's.

Q. Whose handwriting is that?

A. The totals are my own handwriting. I totaled them on the machine.

Q. The second conversation—examine these—that Mr. Zap handed these to you? A. Yes.

Q. And that was in this form?

A. That is right.

Q. And did you adjust the books accordingly?

A. Yes, I put the entries through at that time, charged it corresponding with these two designations of the contract.

Mr. Maury: May the record show I now hand this and give it to the jury? [190-a]

The Court: Yes.

Q. By Mr. Maury: What did you do in here?

A. Oh, back over here?

Q. No, you had better stay over here.

(Testimony of Thomas Cedric Browne.)

A. That appears on the first line of IR 10, invoice record 10.

Q. That is Exhibit 38 for identification?

A. Yes. And appears in total over here in the invoice, $5,298.56, which is then charged to 3-0, in the amount of $3,385.94, and paid 260, in the amount of $1,962.

Q. And then from where did it go through?

A. Into the job cost ledger, under 3-0, we find the entry dated August 28th, University of Washington, in the amount of $3,385.94, under 3-0 of a contract, 83142. The balance of $1,962 appears under the—dated here September 30th, University of Washington, invoice record 10. The other one for $1,962, under 260, of the contract NXs 4105.

Q. That is still the cost-plus? A. Yes.

Q. A portion of that? A portion of that contract? A. Yes.

The Witness (continuing): An original entry in a set of books is an entry in a journal of some nature; in other words, we have here check record, cash receipt record, general [190-b] journal, and invoice record. That is what we call the books of original entry. And the first entries are put into that journal, to be later totaled and posted into a final book of entry, known as the general ledger, or subsidiary ledgers.

An original entry, for one thing, it reflects more detail concerning an entry, and usually more detail about it, than any other place in the books. It is entered from some form of document, you might call

(Testimony of Thomas Cedric Browne.)

it, such as an invoice, or a check, or a deposit slip to a bank; so, therefore, it indicates that there has been some document submitted for the purpose of making that original entry. It is put on the books, what you write on a check, the date of the check, or the invoice, or the deposit slip, which is the first place where you enter such transactions. The truth of an original entry depends upon the, you might say, what truth there is in the document from which you are making the entry.

The Court: You really mean accuracy, don't you?

The Witness: Accuracy, that is right. There are two things involved. There is the accuracy of the document, and then there is also the interpretation that the maker of the [190-c] entry places upon his reading of the document.

There are different types of documents, so one would be, I suppose, the record of the check, in the case of a check, and in the case of an invoice, that would depend upon the accuracy of the maker of the invoice. That is usually a payee and having nothing to do with that particular set of books; it is an outside creditor from whom you received the invoice. Of course, mainly as to amounts, dates, and totaling, and so forth, that is what I am talking about accuracy of the document.

If, then, the original entry is incorrect, for any reason whatsoever, all the following entries in the books will reflect that incorrection, unless subsequently discovered and changed by journal entry.

(Testimony of Thomas Cedric Browne.)

Otherwise, it would go all through the books as the original entry was made.

The Navy Control Account was a bank account which was opened up in the Security-First National Bank in the name of, I believe, E. F. Zap, Navy Control Account. It actually consisted of a loan from the United States Navy in advance against contract NXs-4105, the purpose being to secure considerable time for approval and final payment of various large items, and so as not to burden Mr. Zap with the necessity for too much outside finances to carry that contract.

The way it worked was that as soon as bills totaling fairly sizeable accounts, say a couple of thousand dollars, [191] or to payroll work, were shown to be due and payable by Mr. Zap immediately, by a checking of the particular totals usually by one of the Navy auditors, the loan could be made from the control account to Mr. Zap and Mr. Zap took care of these items and then subsequently to be sent to the Navy for repayment, and by the time they are paid by the Navy, the money would be back in the Navy control account, so it was sort of a revolving fund. That was another and separate account from the accounts to which the records pertained; it was simply an account for the contract NXs 4105.

The book shows that particular item, take $100 item, for example, was charged against a Navy contract on the books of Mr. Zap, and the amount was paid by Mr. Zap's bank account. Now, follow-

(Testimony of Thomas Cedric Browne.)

ing through on that, a bill would then be rendered to the United States Navy for reimbursement, the amount of which was charged against the Navy contract, and then the Navy contract, and then the Navy would pay that bill, which would reimburse Mr. Zap for the amount he originally put into that Navy contract. Mr. Zap paid the creditors.

Cross Examination

By Mr. Lavine:

Following that through just a moment to clarify that situation, the fact of the matter is that these various bills or items were paid by Mr. Zap, as I understand. It is true they were charged to Mr. Zap and paid by Mr. Zap. I [191-a] am the auditor and the one who instructed the Navy to be billed; to state the procedure for billing the Navy, that is what I mean. If I was billing the Navy, I would send in a hand written memorandum to the bookkeeper to make out a bill to the Navy, yes, not in every case, but I mean sometimes. Usually—I would just usually, by word of mouth, that particular item had been—was under the subject of payment by the Navy. If she sent in a bill and the Navy paid it, why then it was paid, but if the Navy didn't pay it, it was not paid of coarse. [191-b]

The bill between Mr. Zap and the Navy was then paid; it is correct; independently of that, and before that time, Mr. Zap made payments to the creditors for the amount that they billed. And as be-

(Testimony of Thomas Cedric Browne.)

tween the insurance companies on like flight tests, they were billed to Mr. Zap and not to the Navy. And it is correct they were paid by Mr. Zap and not by the Navy.

And as to expenses for the billing—rather the expenses for the pilot, and his living expenses, those were paid by Mr. Zap and not the Navy in the first instance. And as to personal expenses and cost of travel, those were paid by Mr. Zap, in the first instance. And as to the flight costs, and the flight tests, those were paid by Mr. Zap and not the Navy, in the first instance.

Mr. Maury: Are you also asking what the books show or what actually happened?

Mr. Lavine: I am asking what actually happened.

Mr. Maury: We object because the witness testified from the books.

The Court: This is cross examination. That is all right. He has a right to go a little further than you have on direct examination.

Q. By Mr. Lavine: But as far as any expenses for working men in the wind tunnel in the University of Washington, and for manpower, that was all charged to Mr. Zap directly, wasn't it? And paid by Mr. Zap, in the first instance?

The Witness: Yes, I guess so. Now, of course, that [192] particular item you are speaking of though—the only checks that appear for payment of power and wind tunnel tests are paid to Mr. Zap for reimbursement of something as paid, not on the

(Testimony of Thomas Cedric Browne.)

books directly to the account. Whatever those charges, or items, or expense, were, Mr. Zap paid them in the first instance. As far as any work done at the flight test field, the men who went up there and their expenses, those were paid by Mr. Zap directly in the first instance; that is correct as far as I know.

Of all those relationships that I am now referring to, was a relationship between Mr. Zap, as the contractor, and those particular persons with whom he had this business transaction; that is right. None of them were with the Navy.

When I came to Mr. Zap in the first instance, I had been recommended to him by the Security-First National Bank. When I was first called in, the first thing I was asked to do for Mr. Zap was to make up a financial statement as of October 31, 1941, which was to be submitted to the bank, and that is all that happened at that particular time. The only thing that happened at that time was I just made an audit of the books, prepared a financial statement so that the bank might have it. Nothing else happened at that particular time. That was November of 1941. I am not an employee of anybody. I became a certified accountant for E. F. Zap, aeronautical engineers; that is correct. The date of that, as I have previously outlined, I think, to the jury, as the scope of [193] my work, was in February of 1942. At that time I started to come in at the end of each month merely to close the books and prepare

(Testimony of Thomas Cedric Browne.)

a financial statement, and nothing else, and that was carried on for the next four or five months; that was the only thing I did.

As I remember, Mr. Zap called me in somewhere along in May or June and asked I spend more time on this particular job in order to expedite the money coming back from the Navy, because he was having considerable trouble at that time with a large number of bills that he had paid being held up for approval by the Navy auditors, so that he could receive reimbursement for them. He said substantially that he wanted me to set up a correct system that would meet with the approval of the Navy. That would probably be correct, because I conferred with the Navy after that as to what it was they required in order to—I went down and saw the Navy cost auditors at that time, and I asked them what would be a correct system to set up that would be—meet with their approval and be fully satisfactory in every respect.

Q. By Mr. Lavine: And they gave you a number of forms, didn't they, at that time? I will show you these. (Witness looks at forms.)

Now, I will ask you to look at those items and see if that is what was given to you by the Navy at that time as the proper forms and as an aid to you, to make out a complete new system, or a complete system of accounting and keeping [194] records?

The Witness: These—most of these—are ordinary forms used by the Douglas Aircraft Company, and

(Testimony of Thomas Cedric Browne.)

was, in the course of the conversation, they were handed to me, by the Navy. However, we didn't use any of these forms subsequently. The idea of the conversation was involving what type of a set of books we could use. You see, no forms were ever used between Mr. Zap and the Navy that came out of these at all. That is the idea of an accounting procedure to set up on his ledger job accounting. At any rate, I took these particular forms at that time. It wasn't until later that any particular forms were ever used. Those particular sheets that I have here are the result of my conference with the Navy, and in endeavoring to set up a new sysfem, or a better system, at the Zap factory. I used some of the wordings on them. I set up the headings, in the cost job ledger, just the words, nothing in the forms at all. It is partly in my handwriting and partly in one of the Navy auditor's handwriting. And, then after I set up our system, Mr. Harry Champlin did not follow the directions that I gave at that time as to various items of billing. He was acquainted with the job cost ledger to the effect that he knew what numbers designated certain items in the contracts, and that those were to be followed in designating the charges for checks and for invoices.

I sent a letter of April 29, 1942, to Mr. Zap, together with a statement there; yes. [195]

There were times when items were charged as fixed fee items, which were not, for cost-plus, and vice versa; that could happen, yes. As a matter of

(Testimony of Thomas Cedric Browne.)

fact, it did happen, and I discovered it myself as an error in connection with matters in connection with the various contracts that Mr. Zap had; from time to time that would happen, yes.

Mr. Zap did work on contracts prior to the letting of the contracts. He did experiment—this is more or less hearsay, I must say; I know that in order to obtain contracts from the Navy preliminary work has to be done to secure the contracts. That is the only thing I know that might you would say, work was done prior to obtaining the contracts which had a direct bearing on the contract.

Q. By Mr. Lavine: I show you here a recapitulation of accounts of Mr. Zap and anticipated future accounts.

The Witness: I think this was made up by Mr. Zap prior to one of his trips to Washington to indicate to the Navy and Bureau of Aeronautics some of the scope of work that had been done—was being done and would be done in the future. This is not an audit. This is merely making up of some figures. They are available or in the books. And it is not anything that is due from the Navy. It is merely an estimated figure for use by Mr. Zap in conference with the Navy. That was a recapitulation of his contracts and his anticipated contracts. You see, in these contracts there are total figures given on this here, rather than to go through the whole papers. [196]

(Testimony of Thomas Cedric Browne.)

Mr. Lavine: I offer this in evidence as Defendants' next in order.

The Clerk: Defendants' Exhibit V, into evidence.

(The document referred to was marked DEFENDANTS' EXHIBIT V and received in evidence.)

Mr. Lavine:

"RECAPITULATION OF ACCEPTED CONTRACTS, ANTICIPATED FUTURE CONTRACTS, AND PROPOSALS BY BUREAU OF AERONAUTICS (U. S. NAVY) FOR ADDITIONAL WORK.

Contracts (Completed and in Process)—Schedule I	$ 739,100.00
Anticipated Future Contracts—Schedule II	257,800.00
Proposals by Bureau of Aeronautics, U. S. Navy—Schedule III	225,000.00
	$1,221,900.00

Contract No. or Description	Original Contract Estimates	Actual Cost Due to Sub-contracting	Percentage of Completion
C-69372	$ 22,500.00	$ 24,500.00	100.00%
C-75017	75,900.00	200,000.00	95.00%
C-75020	5,500.00	5,500.00	100.00%
C-74237	22,500.00	22,500.00	100.00%
C-83142	107,000.00	250,000.00	95.00%
C-86621	11,600.00	11,600.00	100.00%
Grumman Proposal	225,000.00	225,000.00	5.00%

I guess that is all that is important at this time.

(Testimony of Thomas Cedric Browne:)

"DETAIL OF ANTICIPATED FUTURE CONTRACTS BASED ON WORK COMPLETED IN PRIOR CONTRACT. [197]

Flight Testing on Completion of C-83142	$ 11,000.00
Additional rework on C-75017; proposal stage-accepted	16,800.00
Negotiation with Consolidated to apply Zap Flaps to B24 Bomber. Study now in progress. Engineering data $10,000.00	230,000.00"

The next page relates to "Proposals by Bureau of Aeronautics, United States Navy":

"#1—Development of an automatic blow-back feature	
Estimated Contract Price	$75,000.00
#2—Investigation of duplex roll-out type aileron	
Estimated Contract Price	75,000.00
#3—Investigation of flat-type full span flap	
Estimated Contract Price	75,000.00"

Now, Mr. Browne, I will show you a letter dated June 4, 1942, and ask you if you addressed that to Mr. Zap. A. Yes, I did.

Q. Is this a typical letter that you addressed to him on the completion of all of your audits at different periods of time?

A. It is a typical letter, but I didn't give him a letter every time we completed any financial statement. It was just from time to time, when he would be going to Wash- [198] ington or some place. Where he required additional information other than a balance sheet and a profit and loss statement, I would furnish him with other schedules taken

(Testimony of Thomas Cedric Browne.)

from the books showing a detailed breakdown which would be a little more than what you have on just the profit and loss statement and the balance sheet. In other words, they accompanied the balance sheet and the profit and loss statement, showing the detail that might be needed, rather than taking a set of books along with you.

Mr. Lavine: I offer this in evidence as defendants' next in order.

"Mr. Edward F. Zap, 1005 Broxton,
Los Angeles, Calif. June 4, 1942.
Dear Mr. Zap:

In accordance with your request we have recently completed an audit of your books and financial records, the results of this audit being as follows: a recapitulation of contracts with the United States Navy——"

and the rest relates to balance sheets of 1941, which I am not concerned about.

"All of the enclosed exhibits and schedules were prepared after a very complete examination of your records.

I hereby certify that to the best of my knowledge and belief the accompanying recapitulation of contracts is correct; that the balance sheet represents a true [199] statement of your financial conditions as of November 31, 1941; that the accompanying statement of profit and loss truly reflects the results of your financial operations for the past year, and that the recapitu-

(Testimony of Thomas Cedric Browne.)

lation of expenses on the Grumman F4 has been prepared from the actual figures disclosed in your general ledger."

Signed "Harry L. Nourse Auditing Company, by——"

You signed that, didn't you?

The Witness: That is right. In addition to Mr. Champlin being at Mr. Zap's place, there was also a bookkeeper named Ethel Boyle. I would write out a pencil memorandum of how certain things should be made out, and then she would type them and send them in quite fre[illegible]tly. That was the practice.

I am familiar wi[illegible] Form C.A.S. 4 and with C.A.S. 4-(A), and C.A.S. 5, and C.A.S. 5-(A). They were started by Mr. Quint, of the Navy Audit. I mean I don't know quite his official capacity with the Navy Audit, but those were forms which he used in his expediting the audit for the Navy with the Douglas Aircraft Company. As a matter of fact, they are exactly similar, except for the fact E. F. Zap appears where Douglas Aircraft formerly appeared. And when he came down to confer with me regarding the manner of sending in items for audit to the Navy, he suggested that we use these forms, and so we had mimeographed forms made up from the forms which he gave us—I mean the Zap Company did. [200]

That was done by me or under my direction; I just turned them over to Mr. Champlin and he had one of the girls in the office make them up. That is

(Testimony of Thomas Cedric Browne.)

when that came into effect, and what they were, as I say, was a duplication of the same type of forms which the Navy audit used with other companies. Then after the item would be submitted for inspection on a C.A.S. 4 form, the Navy Audit would inspect it and audit it, and send it back to me. If they approved it, then they sent me form C.A.S. 5; if they disapproved it, they sent form C.A.S. 5-(A). Then if they sent back a form C.A.S. 5, I made a notation on it with a direction to make out a bill for that amount. We didn't usually make up a bill just for one C.A.S. 5, but when we had an accumulation of them that amounted to $1,000 or $1,500, or something like that, then an invoice would be made up covering so many C.A.S. 5's. Then I would make out an invoice and bill that to the Navy. I would call that an invoice; I would label it an invoice.

Now those invoices were made up pursuant to notations that I made out, or oral instructions that I gave. When we had so many C.A.S. 5's back from the Navy saying they had been approved for payment, then the usual procedure was just to send back an invoice asking for payment at that time.

Q. I ask you to look at this document. Is that in your own handwriting? A. Yes, it is.

Q. And is that an item that you made out at the time [201] that you were filling out what the charges should be or how the Navy should be charged for the flight tests?

A. It's a chart of accounts, you might call it, in

(Testimony of Thomas Cedric Browne.)

the job cost ledger, and we had these designations of 3-10, 3-15, -25 and -26, corresponding to those numbers in there, and then afterwards I had these notations and had a few copies of these made up so that Miss Boyle and everyone in the office would be familiar with these, so they would not have to go to the books every time they wanted to find out, for instance, what 25-3 for instance, meant; it meant a flight test, contract NXs 4105. It was just a type, so that they would know what it referred to when they saw a check come through which had that designation on it, they would know that was the part of the contract to which it referred. Or if the engineers would see that this particular——

Q. By Mr. Lavine: Now, Mr. Browne, I show you the second item on that list there, "3-15, Flight test, Contract NXs 4105." The first item there listed is "3-10, manufacture and test for static tests"; then you have under that "Contract 83142, fixed fee basis, 3-15, flight test." Was that made in your handwriting? A. Yes, it was.

Mr. Lavine: I now offer this in evidence as defendants' next in order.

Mr. Maury: May I take the witness on voir dire, your Honor? [202]

The Court: Yes.

Q. By Mr. Maury: Who erased "cost plus" and put in "fixed fee" in this second line here, where it says "Contract 83142, fixed fee basis"?

(Testimony of Thomas Cedric Browne.)

You can see through the page there has been an erasure and it originally said "cost plus."

A. Yes. I originally made that up "cost plus," and Mr. Champlin stated that wasn't correct according to the contract and it shoud be "fixed fee basis," and we erased that to make it "fixed fee basis," and from that was made the chart of accounts.

The Court: That answers it.

Q. By Mr. Maury: And you erased that and put it in under fixed fee rather than cost plus then?

A. That is right.

Q. When was that made, that directive?

A. That would be rather hard to say, because all it was was just a memorandum. I would say it was about the time of the completion, if you can tell from the books, of items 3-7, -8 and -9. That would probably be after the last dates on that, because of the fact that it does not show those items on there; it starts with 3-10, which would infer that. There is only one thing about this. This says page 2 on it. Where is page 1? So that apparently that is just a complete breakdown of the job cost ledger.

Q. Can you tell, then, whether or not after that was made up and given to the employees, charges under account [203] 3-15, which, as I understand it, was the flight test, were posted into the fixed fee ledger, rather than the cost plus ledger?

A. They were posted into the cost plus ledger, because 3-15 appears in the cost plus ledger.

(Testimony of Thomas Cedric Browne.)

Q. Yes, sir, and does not appear in the fixed fee ledger?

Mr. Lavine: I object to his cross examining in the middle of my cross examination.

The Clerk: That would be Defendants' Exhibit W, into evidence.

(The document referred to was marked Defendants' Exhibit W, and received in evidence.)

The Witness: I had several of these typewritten up at that time and distributed to the various employees at the Zap place; two or three of them, as directions. Mr. Champlin made out most of the C.A.S. 4 forms. He signed all of the C.A.S. 4 forms. They were made out under his direction by Miss Boyle; or could be made out under my direction. He signed all of them. Miss Boyle made out the invoices. Of course, before she was there—any girl that could run a typewriter could make them out, because the C.A.S. 5's had the contract number on them, so it was merely a recapitulation of the C.A.S. 5's. Mr. Champlin had a typewriter of his own in his office, and he made out, no, I wouldn't say that he did—any typewriter in the office could make that [204] material or typewrite that material for the Ditto machine.

Showing me here a recapitulation of information contained in contract No. NXs 4105—Grumman F4-F, dated May 15, 1942, I probably made it up in conference with Mr. Champlin, because he was

(Testimony of Thomas Cedric Browne.)

the one who read all contracts and gave me the accounting data from them. In other words, I was the one who would suggest the numbers to be charged for the items; he would give me the information to put in here. I made this up, then, from that and had it distributed, to just those who were in charge of anything regarding bookkeeping or accounting in the organization.

Mr. Lavine: I offer this as defendants' next in order.

Mr. Maury: May I take the witness on voir dire, your Honor?

The Court: Yes.

Q. By Mr. Maury: As I understand it, this is under contract NXs 4105. I observe here an item designated "Flight test," and the item is apparently numbered 25-3, and it's listed as a fixed fee. Now, that, of course, is pertinent only to the contract NXs 4105?

The Court: It is in evidence.

The Clerk: Defendants' Exhibit X, into evidence.

(The document referred to was marked DEFENDANTS' EXHIBIT X, and received in evidence.)

Mr. Lavine: I am reading from this duplicate copy, to save time, if it is agreeable. [205]

(Testimony of Thomas Cedric Browne.)

Items	LOT 1	
25-1	Design Data & Drawings	Fixed Fee
25-2	Tool Design	Fixed Fee
25-3	Flight Test	Fixed Fee
25-4	Flight Test Report	Fixed Fee
25-5	Final Corrected Information and Drawings	Fixed Fee
	LOT 2	
26-1	Tests & Miscellaneous Data	Cost Plus
26-2	Lofting and Tool and Template Construction	Cost Plus
26-3	Construction for Static Tests	Cost Plus
26-4	Construction of Plane	
26-5	Fixed Fee on Completion of Contract—No Cost	$2,975.00

1. Cost Plus items to be repaid semi-monthly under terms of contract.
2. Fixed fee of $2,975.00 shall be made as follows:
   A. 25% when 25% work completed.
   B. Additional 25% when 50% work completed.
   C. Additional 25% when 75% work completed.
   D. Balance on completion of contract work under Lot 2.
3. For insurance purposes, plane is valued at $50,000.00.

JOB #25

Lot 1"

I am going to skip various items. [206]

"Flight Test		Fixed Fee
Flight Test Report		Fixed Fee
Final Corrected Information and Drawings		Fixed Fee"

Then Job No. 3:

"Construction and Incorporation of Revised Tail with Drawings	$ 6,745.00
Construction and Incorporation of Revised Folding Hinged Wing	26,750.00
Tooling, Lofting, Tool Design, Templates	16,000.00
Manufacture and Test for Static Test	28,500.00
Flight Test"	

(Testimony of Thomas Cedric Browne.)

That is the copy. Now, Mr. Browne, in connection with the work at Mr. Zap's place there you went over there quite frequently, didn't you?

The Witness: Yes. I can't recall that I ever saw Mr. Zap typewrite. In connection with Mr. Champlin's work there, I have identified a large number of documents here that Champlin wrote out in his own handwriting. He made original entries in the ledger in his own handwriting. While I was in Mr. Zap's place there, I had occasion to observe Mr. Champlin's desk because sometimes I worked at it. It is true I had difficulty finding papers. Papers were on frequent occasions in the desk or lost there that a considerable search had to be made for them. Bills were delayed somewhat sometimes that hadn't been turned over to me for [207] inspection or audit.

A pretty full set of books were being kept under my direction there at that time, after I became in charge. Not necessarily whenever any of the employees had any doubts as to what to do did they come to me and ask me what the thing was to do. Miss Boyle, on frequent occasions asked me, on procedure. Yes, certainly. Mr. Champlin asked me what to do on procedure. Mr. Zap never asked me at any time to juggle any accounts. He never asked me to make any erroneous entries or change any entries around. He never asked me to engage with him in any scheme or trick or device to enter entries into any records that would falsely reflect the books of

(Testimony of Thomas Cedric Browne.)

the Zap Corporation. He never at any time in connection with any of these items asked me to charge one item to one account that I knew should be charged to some other account.

Redirect Examination

By Mr. Maury:

The Witness: There is an item here on the invoice record of that set of books, indicating that insurance was paid upon Mr. William McAvoy, a test pilot employed during September and October of 1942, under contract 83142. It indicates, on invoice record 11, Harry H. Kamm and Co. Ltd., in the amount of $135, which would probably have to be verified by the invoice itself from the insurance company; Harry H. Kamm and Company is an insurance company. It was charged [208] to Mr. Zap's personal account. This item was paid on October 10 by Mr. Zap, by check No. 2743, which appears on check record page No. 59. These books show an item paid to Mr. McAvoy under account 3-15, in the sum of $4,000 on September 23, 1942. I believe that is the only item appearing in the books made out directly to William H. McAvoy, that one check in the total of $4,000. In making an audit of these books, I never did ask Mr. McAvoy how much he received.

Check No. 384, which shows on check record 47, shows in the books that it was dated the 8th of May; the amount of $800.00; the item is reimbursement E. F. Zap account, wind tunnel tests, design infor-

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(Testimony of Thomas Cedric Browne.)

nation, job 26-1; check No. 2502 in the sum of $1,000, dated July 15, 1942, made payable to E. F. Zap, for wind tunnel expenses.

As a part of Exhibit 6 in evidence, the certificate of E. F. Zap concerning check No. 360 was read.

I made a continuous audit of Mr. Zap's books from the end of 1941, so I would say we had monthly audits.

I did not check outside of the books, nor did I go outside the books to creditors, except when I made up the statement as of October 31, 1941, to ascertain whether the amounts shown owing on the books were correct and agreed with amounts shown on the books of creditors.

I never did go to the creditors to find out whether they had been paid, during the entire course of my work there, un- [209] less there would be a disagreement between a statement they sent and the books as to a payment which I might have showed and then I would confer with them by letter.

I never did check to determine whether the work charged on these books of Mr. Zap's was actually done under the contracts to which it was charged; I could not do so for the reason that the work being done was engineering and being put on graphs, and that sort of thing, and I couldn't tell what contract it referred to in any manner whatever because it was just engineering work on paper, and I couldn't tell from an examination of that what particular contract it referred to. An engineer would have to do it,

(Testimony of Thomas Cedric Browne.)

Recross Examination

By Mr. Lavine:

I said I am not familiar with engineering terms and engineering data; and when I made out these bills or told the girl there to make out the bill, I would make it out under such appropriate title or under such appropriate language as I thought was applicable. I am speaking of invoices now, to the Navy.

Coming back to the C.A.S. forms, when I made those out I simply made them out showing the date and the name of the payee and the amount. That is the only thing that was required by the Navy. We just showed the items, the contract against which if was charged, and then it would be subsequently audited by the Navy to determine whether that was correct. The language or expression in the invoice came from the [210] creditor, so that invoice reflected what the creditor had done for Mr. Zap.

I had a conversation with Mr. Zap just before he went to Washington, in October of 1942, with relation to discharging Mr. Champlin. Well, if you want to state it in words used, he asked me if he should fire Mr. Champlin, and I said no. I further stated if he was going to do that at that time he should wait until he came back from Washington. I did not advise him either one way or the other.

(Testimony of Thomas Cedric Browne.)

Redirect Examination

By Mr. Maury:

Witness: This thousand dollar item of July 15, 1942, which I stated had not been charged to the Navy, meant that that had never appeared on a direct charge to the Navy for reimbursement. Whether or not that was paid through the Navy Control Account would not appear on these books, but upon a memorandum of the running costs of this particular contract, so that we would know what the total cost had been to date for application for an advance from the Navy Control Account. These books then do not show whether that thousand dollars had or had not been charged to the Navy. These books show that about $30,000 was advanced during the early stages of the contract from the Navy Control Account. It would require an examination of other documents to determine whether this thousand dollars was included in that $30,000.

I had a conversation with Mr. Zap concerning that par- [211] ticular charge. This was about the time of the receipt of the invoice from the University of Washington, about the first week in September. That was Exhibit 16, the statement of the University of Washington which we discussed. The conversation was in Mr. Zap's office.

I asked Mr. Zap whether this thousand dollar item represented a direct payment to the University of Washington, which should have been shown on that particular statement for $5,000; in other words,

(Testimony of Thomas Cedric Browne.)

whether the bill should have been $6,000, with a thousand dollar credit shown, or whether the $6,000 was the total charge and there should have been a credit for the thousand dollars; whether there was a direct connection between this $5,000 bill and the thousand dollar item, in determining the correct procedure in my accounts payable.

I had another later conversation with Mr. Zap concerning this same bill from the University of Washington in which Mr. Zap told me the thousand dollars was for wind tunnel experiments for additional cost of the experiments, besides the $5,000 on the invoice.

Recross Examination

By Mr. Lavine:

By the Witness: The first conversation I had with Mr. Zap was about the first week in September in his office. The conversation was merely that I asked him for an allocation of this $5,000 invoice as to contracts and he informed [211-a] he would give it to me later. Approximately ten days passed between the first conversation and the second one, and then I asked him a second time to give me an allocation. Zap said the thousand dollar reimbursements were additional expenses besides those shown on the invoice. [211-b]

HAROLD E. DALE,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Binns:

Q. Where do you live, Mr. Dale?

A. I live at 935 13th Street, Hermosa Beach, California. I work at Northrop Aircraft Company, Hawthorne. I started to work for Mr. Zap on December 9, 1940. When I first went there I was a designer, aeronautical engineer. I received a promotion. On January 1, 1942, I was made assistant chief engineer, and approximately five or six months after that date I was made chief engineer. I terminated there approximately November 25, 1942.

My duties were more or less the coordination of the structural design of the contracts that he had, rendering them into drawings, making drawings, and to coordinating the stress analysis with the drawings in order to construct the planes called for and the parts called for in his contract. Previous to my appointment as assistant chief engineer I made a series of drawings that were called Project 15. It was to be a cargo plane, or a bomber—some sort like that. It was to be a very large plane, about 150 foot wing spread. It was just a very preliminary design, more or less study at the time I worked on it. I cannot tell the exact date, but I would estimate that was some time around October, 1941.

[212]

(Testimony of Harold E. Dale.)

After I made those drawings work continued in the aerodynamics department right on through, up until we terminated—until I terminated, in November, 1942. There was a wind tunnel model constructed of that plane. Wind tunnel tests were conducted.

Mr. Dale. I wrote this letter, marked

GOVERNMENT'S EXHIBIT 46,

for identification. I sent that letter to Mr. Zap.

The Court: It will be admitted.

Mr. Binns:

"January 8, 1942.

Mr. E. F. Zap
T.W.A. Passenger Office,
Dayton, Ohio.

Dear Ed:

Enclosed is the preliminary estimate of time involved for Project No. 15. This has been prepared by us on the basis of past experiences and checking upon current contracts. It is accurate as we see it, neither conservative nor optimistic. I have herewith taken the liberty to summarize the probable cost of this project for one experimental airplane. This cost would cover production, engineering and tooling.

(1) Total engineering, 160,000 hours, $3	$481,800.
(2) Total tooling and manufacturing, 147,000 hours, $2	$294,000.
(3) Materials	$ 98,000.
Total	$873,800.

(Testimony of Harold E. Dale.)

The above does not include insurance, over-[213] heads, flight test expenses, government furnished materials such as engines, props, etc., or miscellaneous items.

Wishing your every success,

HAROLD DALE."

May the record show that Government's Exhibit 46 is being passed to the jury?

By the Witness:

This drawing marked Exhibit 12 was of a wind tunnel model in connection with the Project 15. Government's Exhibit 13 are all one of the models for the Project 15. Wind tunnel model photos marked Government's Exhibit 14 is a project 15 model. Government's Exhibit 15 is a Grumman model F4. Model drawings—model pictures.

Q. By Mr. Binns: Mr. Dale, will you please, as briefly as possible, explain to the jury what a Zap flap is?

A. A Zap flap is a device to increase the lift of an airplane's wings, to be used for takeoff and landing. Its use in takeoff would be a partial extension of the surface to increase the area of the wing. It might be likened to having a larger wing for takeoff. This will allow the airplane to get off the ground at a slower speed and at a quicker rate.

Upon landing this same device can be further extended, at which time it not only increases the size of the wing, but also changes the effective chamber of the wing, adding a lot [214] of drag to it, more

(Testimony of Harold E. Dale.)

or less to be likened to a brake, so that during the landing operation the airplane can approach the field at a slower rate of speed, and can actually land at a slower rate of speed, and can actually land at a slower rate of speed.

By employing a device of this kind it enables a designer in his original design to make the basic wing smaller, so that when he is up in the air and doesn't need that rapid takeoff and slow land why, he can get the maximum efficiency from his plane by having a lower drag rate; therefore, the airplane can go faster.

Would you want me to describe the shape of it? That would be the action of the Zap flap. The same identical Zap flap is not installed on each model of airplane. Each model would have a slightly different—it would have to be designed to the particular model airplane. If you had a flap designed for a Gruman, it would not fit on a Vought-Sikorski. The Government contract number 83142 covered the Vought-Sikorski airplane, and 4105 covered the Gruman plane. There was no Government number covering Project 13, to my knowledge.

Mr. Lavine: Object to that as calling for a conclusion of this witness.

The Court. He has answered it, not to his knowledge.

Cross Examination

By Mr. Lavine:

At the time that I wrote this letter to Mr. Zap, Mr. [215] Zap was at Wright field, I believe, in

(Testimony of Harold E. Dale.)

Dayton, Ohio. It is a testing field for Army work primarily. Prior to writing that letter and prior to this time, I had been working on this Project 15, just sporadically, and I was just making preliminary sketches and furnishing preliminary data, as requested.

Mr. Zap's engineering data which he asked me to work on concerned the use of this plane for wartime use, and for the purpose of handling bombs and bombers. This plane was to be at least 150 feet, and to carry all kinds of military equipment.

Now the Zap flap which I have described here, I stated that different planes would have different types of flaps. By that I mean that a plane that was large would have to have a larger flap than one that was smaller. And, in that respect, however, the flaps were all the same; it's merely the application of the principles to different sizes of planes. Every airplane has a wing, and all wings are similar. And I might point this out to you. Probably the best answer to it would be the direct comparison of the flap on the OS2U and the flap on the Grumman F4, the two contracts that we worked. The flaps were similar as far as science was concerned. Physically dimensions were not similar. And one flap would not fit on the other airplane. However, the experimental work that would be conducted to test these [216] different flaps would not be altogether identical. Each aircraft that you would install that flap on; that is each model aircraft would have to be

(Testimony of Harold E. Dale.)

individually tested for stability and the proper tail surfaces, for example, the proper ailerons. The whole thing would have to be brought into balance by the proper design of flap, the proper design of tail; so that while the technique is somewhat similar, is the same, and is improved as time goes on from model to model, still each new model airplane that this technique is applied to requires extensive study to bring it into balance so that the thing, when flown, will be as close to perfect as possible.

I did no work on 83142, to my knowledge, before the contract was let. When I came to work for Mr. Zap I at least was told by him he had that contract in force. On 4105 we did some work before the contract was given to us; I am not familiar with contract 11909.

Well, the flap is not on any war plane being used in combat at present. I couldn't possibly see how I could answer that question as to whether I had an opinion as to the value of the flap, in any other way.

I stayed on approximately six weeks after Mr. Zap was arrested.

I addressed a letter to the Government, stating that the project was of great value in the war effort.

Q. By Mr. Lavine: Approximately when did you send [217] that letter to the Government?

By the Witness: It would be approximately—it would be in the month of November, 1942, soon after my return from Washington, D. C., and that

(Testimony of Harold E. Dale.)

was after Mr. Zap's arrest. It [217-a] was soon after my return, I would say, and it would only be approximately, it would be in November, around the 15th or 16th or so. I addressed that letter to the Bureau of Aeronautics of the United States Navy.

I believe I informed them of Mr. Zap's arrest and absence at the time. I more or less asked them for instructions as to how I should proceed, or if I should proceed; the firm was still intact, the men hadn't been paid for two weeks, I wanted some indication from them whether I should assume the responsibility of discharging the men, in Mr. Zap's absence; whether they wanted the work to continue; and I said that I would be glad to go ahead with any of the changes that were required as I had discussed with them on 83142—that is on the Navy OS2U-3075, the airplane that was flying—and pointed out to them that I did not want the responsibility for continuing or not continuing. The point of the letter was instructions from them.

I did not go to the University of Washington at any time during 1942. And my knowledge of these particular pictures that I looked at—I can't tell when those were taken. I don't know whether they were taken in 1941 or 1942.

As far as my work on project 15 is concerned. I don't know who gave that project that number. I knew of it as early as 1941 in that respect.

I went to Washington, D. C., with Mr. Zap in October, 1942. I am not positive of the date. I did

(Testimony of Harold E. Dale.)

go to Washington [218] with Mr. Zap on one occasion, and I met him there on another occasion. It's quite possible that it was October that I did meet him there. I am speaking of Washington, D. C.

I know Bill Butler is a civil service employee for the United States Navy office, who was working as an assistant, I believe, to Commander Scott. He is an engineering inspector, and worked at the Zap office there and inspected the drawings and engineering on these two contracts, from time to time. And Butler would approve these basic or master drawings before they were sent to the sub-contractor for manufacture. The basic design, the drawings that comprised the basic design would be sent to Washington for approval, and upon that basic design certain detailed drawings would be taken off and approved by Butler and sent to the sub-contractor.

[219]

ETHEL H. BOYLE,

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maury:

I was the bookkeeper for Mr. Zap—not during last year—since September, from Labor Day until the day of closing. I had charge of the payrolls,

(Testimony of Ethel H. Boyle.)

and I did all the bookkeeping under the direction of Mr. Browne and Mr. Champlin.

Calling my attention to Government's Exhibit No. 7, in evidence, I recognize this cancelled check. I first saw it on September 23rd. I saw it again the day I was to fill it in. I first gave this letter to Mr. Browne. In fact, I know I gave it to Mr. Browne. It was a blank check. I was told to put in the date and to put the account to which it was to be charged, which was 3-15. I handed the check to Mr. Browne in blank. I saw it again when it was given to me to fill in. Well, now I am just a little bit hazy on—I believe it was Mr.—I think Mr. Zap gave it to me to fill in. I am not quite sure, but I gave it back to Mr. Browne to ask the amount to put in. Well, now it comes to me that Mr. Zap came to my desk and gave me the check and I went over to Mr. Browne to find out just how I should fill this in, and I was told the fixed fee was $4,000, and to fill it in, and to fill it in for $4,000. [220]

Well, as far as dates, I wouldn't be able to say. I imagine it was—well, it was some time in October, because I know I later took it over to the bank and deposited it. Well, surely I handed it to Mr. Browne in blank prior to the Daggett trip, because the Daggett trip was in October, and this was in September. I received it back with the instructions to fill it in after the Daggett trip. (Examining) Well, when was this check put through? "10-13." Then it must have been—surely, it was put through 10-13.

(Testimony of Ethel H. Boyle.)

I deposited it in the bank 10-13, October 13th. I typed in the name of the payee. I typed in the whole thing. Mr. Browne told me to type in the name of Mr. McAvoy. William H. McAvoy, and the $4,000, because it was a fixed fee. I made out all the checks after I was hired there.

Check No. 2683 for $250, dated September 25, 1942, payable to E. F. Zap, and No. 2768 for $1010, dated October 14, 1942, payable to E. F. Zap, were posted by me to the check record, Government's Exhibit 57, and charged thereon to account 3-15, which is the flight test account. These two checks were then received in evidence under Exhibit No. 37.

Cross Examination

By Mr. Lavine:

I stated that this check for $4,000 was made out—that the typewritten part of it was typed by me, that is, I typed in "Pay Four Thousand Dollars, $4,000, to the order of [221] —"that is my typing, "William H. McAvoy." And I typed in "Four Thousand Dollars." I typed in the entire check. At the time that the check was handed to me to do the typing in, Mr. Zap's written signature was on the check. I said that I got instructions from Mr. Browne as to how to fill in the check. Mr. Browne furnished me with a typewritten statement as to how the items of charges were to be made. I see here [221-a] Defendants' Exhibit W, a work sheet, written by Mr. Browne. I know Mr. Browne's handwriting. A typewritten sheet of a similar character

(Testimony of Ethel H. Boyle.)

was furnished to me at the place of business. That typewritten sheet had "3-15, flight test", and had over it "Contract 83142, fixed fee basis".

Now, at the time that the check was handed to me by Mr. Browne, I don't recall that Mr. Zap was present. I don't think so. Mr. Zap was in and out. In fact, I had so little to do with Mr. Zap—all my instructions came from Mr. Browne and Mr. Champlin. I really don't recall Mr. Zap being around at the time. I do know I went to Mr. Browne. I gave the blank check at first, and I had "September 23, 1942," typed on the blank check, as well as my "3-15" down in the voucher part. Then when this check was given to me to fill out I asked Mr. Browne how much I should make it out for, and, well, I was told to make it out to McAvoy and how much I should put in. And it was endorsed and the signature was on, as I recall it. But where Mr. Zap was I don't know. That is, it was endorsed on the back by Mr. McAvoy, and Mr. Zap's signature was on the face of the check; but that wasn't anything irregular. Quite often Mr. Zap left signed checks for me so I had my signed checks of Mr. Zap when he was away. Mr. Browne would tell me to whom they were made payable. He would always give me all these bills and I'd use my signed checks for the payment of these bills. My instruction from Mr. Browne was to follow his memorandum on this contract 83142. [222] And in preparing this check I followed that memorandum, and Mr. Browne's in-

(Testimony of Ethel H. Boyle.)

structions to me. This rubber stamp on the back of the check, that was stamped by me. Mr. Zap didn't endorse this check on the back after I filled it out. I took this check to the bank. I made a deposit and went over specially with that check. To my knowledge, I don't think Mr. Zap ever did see it after I filled it out. I wouldn't know.

I worked in the office there keeping the books and records. My duties with reference to the making out of forms of claims——

Q. What were your duties in preparing items for the United States Navy?

That is to say, I am referring now to how you prepared C4 form when you prepared it, and C5 and C5A? Just what you did and how you received your instructions and from whom?

A. Well, C.A.S. 4 forms would be written in pencil and then I would type them and Mr. Champlin would take them down to Mr. Quint's office. Mr. Browne first would write them in pencil. Mr. Quint was a civilian auditor for the United States Navy. And then if there was any correction, if they were not—if they were not allowed by the Navy Department we would get a C.A.S. 5A and I would have to re—Mr. Browne would again go over the records and pencil the C.A.S. 4A, reinstating the claim the way the Navy Auditors wanted it. And if it was not allowed then it was [223] put through as a group, as against Mr. Zap's account. If it was allowed, first then C.A.S. 5A was issued and that

(Testimony of Ethel H. Boyle.)

was our signal to prepare an invoice, and Mr. Browne again would give me a pencilled statement of the invoice, and I would make out the invoice and then it would be mimeographed to make five copies, four copies of the last month or so, and then it was on this ditto machine, and we would get our voucher from that, from the Government. When the invoice was oked we got a paper and then we vouchered it out for him to sign and then we would get our check. I received all of my instructions from either Mr. Browne or Mr. Champlin. The only thing I ever did on my own was the compiling of the payroll, and before then I made Mr. Champlin go over all the time cards, because I wanted and felt he should do something. Mr. Zap never gave me any instructions. I only talked to Mr. Zap twice or three times while I was in his employ, until this case came up. Mr. Zap was so busy. In other words, all the handling of the time cards and the making up of the time sheets, I followed the instructions of either Mr. Browne or Mr. Champlin. I compiled the payroll myself and entered it in the books, but the distribution of the time was given me by Mr. Harold Dale, and then I made out C.A.S. 4's on the payroll; that was the only thing Mr. Browne ever gave me. I made those up myself.

The distribution of time was given to me by Mr. Dale on [224] a mimeographed sheet telling me to which accounts I should charge the various time. Mr. Champlin had this mimeographed sheet pre-

(Testimony of Ethel H. Boyle.)

pared and he was in the office with Mr. Dale. I saw Mr. Champlin and Mr. Dale conferring over these cards. I made out the payroll on Wednesday and they paid Friday, ten days later. Prior to making out the payroll I saw Mr. Dale and Mr. Champlin confer; it was a weekly occurrence; when they conferred I saw time cards in front of both of them, and I saw them looking at those time cards together. On occasions I heard them discuss the allocation of time on those cards. Thereafter, I received the cards themselves in the first instance when I made out the payrolls from the cards and the time, from the time cards, but the distribution of the time in the shop to the men was on a mimeographed sheet that was signed by Mr. Dale. In connection with the entry of those particular items on the books, I received instructions from Mr. Champlin and Mr. Browne both, and I received instructions to enter those particular items in the books by Mr. Zap and Mr. Browne. I followed those instructions.

Mr. Zap at no time ever told me how to enter any of those items in the books. Mr. Champlin's position at the Zap organization was Comptroller. Mr. Champlin wore a big badge saying he was comptroller. I was there at the time Mr. Zap returned from Washington and was placed under arrest. I [224-a] was one of the signers of a letter at that time to the President. I typed it. Looking at this letter which is Defendant's Exhibit Y for identification—I typed

(Testimony of Ethel H. Boyle.)

the letter. And afterwards it was signed by various employees of the Zap organization.

I was in the office immediately after Mr. Zap left Los Angeles for Washington, D. C. daily. I saw conferences—and I saw Mr. Champlin at that time, every day. There were conferences every day going on between him and other employees. Mr. Champlin was conferring with—well, it was in the private office and I wouldn't say who was all there at different times, because I was not in the private office, but there were conferences going on. Mr. Champlin told me, during the absence of Mr. Zap, that he intended to become the head of the Zap organization. He told me that was one of his aspirations.

The Court: Move to strike that out. Strike "one of his aspirations".

Q. By Mr. Lavine: Did he tell you—I guess that is all I can think of right now. That is all. Just a minute.

By the Witness: Now, I mentioned something about Mr. Zap signing checks and leaving them in the blank. He signed other papers, to my knowledge, and left them in blank, such as report papers. He signed papers and letter- [225] heads for different things to be filled in in his absence, as well as checks.

I recognize this form, this photostat marked defendant's AA for identification. It is the form in which the time of the men and the charges were given to me; it was signed by the chief engineer, Mr.

(Testimony of Ethel H. Boyle.)

Harold Dale, and it is on contract NXs-4105. The same thing would be true of contract 83142. Defendant's Exhibit AA was received in evidence.

Mr. Champlin told me that he intended to become president of the Zap organization, the head of it.

Q. By Mr. Lavine: Now, about when was that after Mr. Zap left Los Angeles?

Mr. Maury: Objected to as leading.

The Court: Well, it is cross examination, counsel.

Mr. Maury: I don't think it is proper cross examination, your Honor. He is going into things so far afield from the direct, I am going to ask this witness be made his witness. [426]

Redirect Examination

By Mr. Maury:

Q. Calling my attention again, Miss Boyle, to these two checks, Exhibit 37, in the respective sums of $250 and $1010, both payable to Edward F. Zap, I posted them first into the check record, and then you posted them, in accordance with my instructions, under whatever account they belonged.

A. That is right.

Mr. Lavine: I object to this as not proper redirect examination, your Honor. I don't believe a single question on cross examination was asked this witness about these two checks. We took the position they were not relevant to this case and we didn't ask a single question about them. Now, that is not the proper redirect examination, your Honor.

(Testimony of Ethel H. Boyle.)

By the Witness: Calling my attention to this Government's Exhibit 41 for identification, that is a Job cost ledger.

Mr. Lavine: There has been nothing asked about this ledger on cross examination.

The Court: Are you referring to check 2768?

Mr. Maury: It is 2769, your Honor—2679.

The Court: 26——

Mr. Maury: 2679 for $4,000.

The Court: Wait a minute. There is one. You had two. Is the other check 2268? [226-a]

The Witness: Yes, it is.

Mr. Maury: Yes, sir.

The Court: The witness testified that that was a check for $1010, October 14, 1942, to Edward F. Zap charged to account 315, for the flight test.

Mr. Maury: Let me examine——

The Court: Yes.

Mr. Maury: It was the cost plus ledger for a fixed price?

The Court: Cost plus ledger.

Mr. Maury: My understanding——

The Court: A check, and charged to 315.

Mr. Maury: My recollection of her testimony on cross examination was that she charged these matters to account 315 under the direction of Mr. Browne, and that that was a fixed fee account.

The Court: Well, proceed, if there is any dispute.

Mr. Maury: And I would like to have that straightened out.

(Testimony of Ethel H. Boyle.)

The Court: All right. Proceed.

Mr. Maury: Here is account 315 in this book.

The Court: Yes.

Mr. Maury: That is Government's Exhibit 41.

The Court: Proceed.

Q. By Mr. Maury: Is that the cost plus ledger or the fixed fee? [227]

A. That is the cost plus ledger.

The Court: A little louder.

Q. By Mr. Maury: Which is that?

Mr. Lavine: I object to that as calling for the conclusion and opinion of this witness.

The Court: This witness should know the books she worked on, counsel.

Mr. Lavine: But as to whether—she says it is the cost job ledger.

The Court: It ought to be something. It is not a dictionary. It ought to be something. The witness can tell what it is, counsel.

The Witness: It is the cost job ledger.

Q. By Mr. Maury: Were there two cost job ledgers?

A. Yes, there were.

Q. And which one is that?

A. There is the fixed fee.

Q. That is a fixed fee?

A. No, there is a fixed fee ledger and a cost plus.

Q. And this Exhibit 41 is the cost plus?

A. Cost plus.

Q. Calling your attention to Exhibit 42, what is that?

A. That is the job cost ledger fixed fee.

(Testimony of Ethel H. Boyle.)

Q. Now, in which one did you find account 315? [227-a]

A. In the job cost ledger cost plus.

Q. Calling your attention to that account, and to all entries therein, after September 1, 1942, are those in your handwriting?

A. These are my handwriting.

Q. Yes.

Mr. Maury: I think that is all.

Mr. Lavine: There has been nothing asked about this ledger on cross examination.

By the Witness: That is the cost plus ledger.

Q. By Mr. Maury: There were two cost job ledgers, and which one is that—there is the fixed fee—there is a fixed fee ledger and a cost plus—and this Exhibit 41 is the cost plus. In job ledger cost plus. I find account 315, that is the job cost ledger fixed fee.

Cross Examination
(Resumed)

By Mr. Lavine:

Q. In connection with this ledger, this job cost ledger, Mr. Zap had nothing to do with your making that ledger up?

By the Witness: He gave me no instructions. Mr. Champlin or Mr. Browne gave the instructions as to how to get up this ledger, or what to do. I worked under Mr. Browne. And in getting up this ledger I listed the heading of 3-15 as flight test. In connection with that I wrote that [227-b] word "Flight

(Testimony of Ethel H. Boyle.)

test" there, on page 1 and 2—that is my writing.

Q. There is nothing on there that states whether it is a fixed fee or cost plus, is there?

Mr. Maury: Objected to. The evidence speaks for itself and it is obvious there is not.

The Court: That is right.

By the Witness: To my knowledge, Mr. Zap never did see this ledger, these particular pages in this ledger referring to page 1 and 2 here.

Mr. Lavine: That is all. [228]

MARION SIMON ISRAEL

called as a witness by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Marion Simon Israel.

The Clerk: Take the stand, please.

Direct Examination

By Mr. Binns:

I live at 5942 South Ladera Park, in South Los Angeles. I am employed at Lockheed Aircraft Corporation. I was formerly employed by E. F. Zap Aeronautical Engineers. I was employed by Mr. Zap from February 17, 1941, through the greater part of November, 1942, as stress engineer. As soon as the department expanded to greater importance,

(Testimony of Marion Simon Israel.)

I became chief stress engineer. A stress engineer is responsible for the structural integrity of the airplane; that is to say, he must see that it is strong enough; to make necessary computations to prove that it is strong enough, and to submit reports summarizing the strength calculations. During my period of employment, the stress department at Zap did not do any work along that line, on what is known as project 15. I myself did work on project 15.

Mr. Lavine: I object to that as irrelevant, incompetent and immaterial.

By the Witness: I worked on project 15 approximately [229] 5 days. I wrote a performance report. I don't know whether it was submitted. It was delivered to Mr. Zap's custody. I discussed project 15 with Mr. Zap, a little. That is, may I correct that? I was advised as to my duties in writing this report. I don't believe I actually discussed it back and forth. I don't remember whether Mr. Zap advised me, or he had me advised through someone else.

Cross Examination

By Mr. Lavine:

Q. Mr. Israel, those reports are only passed upon by the Bureau in Washington, and they are of a highly technical nature? A. Yes.

Q. Was that report sent to Washington?

A. I cannot reply—I can't give you a direct answer to that.

I worked in 1941 on certain stress information

(Testimony of Marion Simon Israel.)

that related to contracts in connection with contract 83142. And then subsequently I worked on stress information in connection with contract 4105, in NXs-4105. I am not sure of the exact date NXs-4105 was issued. It was sometime during the early part of 1942; we worked on that airplane previous to that. I was working there when other contracts, under other contracts besides these two, the contracts in the 7500 series—I worked with Mr. Zap during the extreme latter portion of the contract executed by Northrop. I assume that [230] is the contract you are referring to.

I am generally familiar with the value of stress information. I formed an opinion as to the value of these aerodynamics work that was being done by Mr. Zap. My opinion was that the work was highly valuable—highly valuable in the war effort, among other things.

LELAND E. REED

called as a witness by and on behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Binns:

(Witness) My name is Leland E. Reed. I live at 1011 Huntington Drive, So. Pasadena. I am a model maker. I did some work for Mr. Zap for a period

(Testimony of Leland E. Reed.)

of approximately three years ago, I would say, up to about four months ago.

On Government's Exhibit 31 where it says lucite forming, my original bill to Mr. Zap called for freight to Seattle, $45.70; that is prepaying the freight of the models to Seattle.

These photos which are Government's Exhibit 13, I can identify as pictures of the model to which I have referred as a cargo wing.

I believe these pictures, marked Government's Exhibit 9, are pictures of the same model. This is a picture of one of the wings that I referred to as a cargo wing. [231]

CLERK'S COPY.

Vol. II

TRANSCRIPT OF RECORD

(Pages 481 to 813)

Supreme Court of the United States

OCTOBER TERM, 1945

No. 489

EDWARD F. ZAP, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 8, 1945.

CERTIORARI GRANTED JANUARY 7, 1946.

No. 10419

United States

Circuit Court of Appeals

For the Ninth Circuit.

EDWARD F. ZAP,

Appellant.

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

In Two Volumes

VOLUME II

Pages 481 to 774

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

HARRY CHAMPLIN.

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Maury:

I reside at 430 South Sepulveda Boulevard, in Los Angeles.

Q. I understand you were employed by Mr. Edward F. Zap for some time?

I started my employment either the latter part of November, or the first part of December, 1942. I worked there until last October, I believe it was. I started my employment there as a draftsman, and then after the first of the year there had been some difficulty with the bookkeeper and Mr. Zap put me in charge of the books. I was given the title of comptroller. I wore a badge—it said "E. F. Zap Aeronautical Engineers, Harry Champlin, Comptroller." As auditor and comptroller, my duties were to take care of the books, generally. I am familiar with the books.

Q. Now calling your attention, Mr. Champlin, to this group of ledgers—checks, ledger sheets, bank statements.

The Court: As you examine each one of them, state for the record what the identification number is.

Mr. Maury: They are identification numbers 34 to 45, inclusive. [231-a] Are those the books that were under your supervision and direction?

(Testimony of Harry Champlin.)

A. Yes, sir.

Q. Are you familiar with all of them?

A. Yes, sir.

I recognize this document now marked 49 for identification; this portion of it, which the fourth page in the sequence in that document; this is the letter to which I have just testified.

(Thereupon, the Government read into evidence that portion of

EXHIBIT 49

designated by the witness which was and is as follows:)

"Office
E. F. ZAP
1005 Broxton
Los Angeles, Calif.

REF:Z-422-HD:1h
Restricted

E. F. ZAP
10976 Wilshire Boulevard
Westwood Village
Los Angeles, California
January 29, 1942

To: Resident Inspector of Naval Aircraft, U.S.N.,
Douglas Aircraft Company, Inc.,
El Segundo, California

Subject: Contract 83142—Flight Test on OS2U-1 Airplane Zap Folding Wing Version—Quotation on. [232]

Reference:
(a) Specification SR-38C

(Testimony of Harry Champlin.)

Enclosure:

(A) Map Report No. 135—Proposed Preliminary Flight Demonstration Schedule.

1. Since no provisions for preliminary flight demonstration were included in subject contract and since the project is entering the final stages of completion, the contractor has taken the liberty to investigate the possibilities of conducting the flight tests on the subject airplane and respectfully submits herewith a quotation covering the cost breakdown based upon the program outlined in Enclosure (A).

a. Chief Test Pilot's Fee & Insurance	$ 4,000.00
b. Flight Engineer Fee & Insurance	650.00
c. Ground Crew	900.00
d. Special Equipment Rental	320.00
e. Gasoline and Oil	180.00
f. Flight Engineering Reports Evaluation	2,900.00
g. Crash insurance	4,200.00
h. Ground Coverage Insurance 30 days	580.00
i. Public Liability and Property Damage Insurance	180.00
	$13,910.00
j. Contractor's Fee at 6%	834.60
Total Cost	$14,744.60

[232-a]

2. Tests outlined in Enclosure (A) will involve approximately 15-20 flight testing hours in Los Angeles area.

3. In accordance with Reference (a) para-

(Testimony of Harry Champlin.)

graph B-6, the contractor herewith proposes to employ Mr. Wm. H. McAvoy as chief test pilot, to conduct the tests outlined in Enclosure (A). Mr. McAvoy's long experience with the N.A.C.A. makes him particularly suited for this demonstration. In addition the contractor proposes to employ Mr. Harold E. Dale as flight engineer. Mr. Dale's position as assistant chief-engineer for this contractor qualifies him to direct the demonstrations outlined in Enclosure (A) and make observations useful to the Bu.Aero. It is the contractor's intention to make additional flights to determine results of various aileron-vane settings, tuft tests for observation of flow characteristics, take-off and climb tests involving various flap positions, and minor aerodynamic investigations and adjustments to enable the contractor to submit the subject airplane for final demonstration in its most advantageous conditions. For this reason it is highly desirable to have a flight engineer on all flights after the first pilot's familiarization flight.

(Signed) EDWARD F. ZAP [232-b]

I have seen Government's Exhibit 7 in evidence before. Mr. Zap gave me that document to collect $4,000 from the Navy; this was shortly before he went to Washington, D. C. on his last trip in October, 1942. On this occasion he said nothing more to

(Testimony of Harry Champlin.)

me than to hurry down and get this money through. I did so. I am familiar with Government's Exhibit 8 in evidence, a letter from the University of Washing, dated August 25, 1942. I saw it when it was delivered to the office of E. F. Zap in the regular course of the mail. At that time it did not have these pencil markings on it in the margins on both sides; those pencil notations are in the handwriting of Mr. Zap. On the carbon copy in Government's Exhibit 16 in evidence, the inked figures in handwriting were not on that document when I first saw it; I have seen it before in connection with the previous exhibit, Government's Exhibit No. 8. When I first saw it, it did not have those figures on it. Those figures are in the handwriting of Mr. Zap. I saw him put them there.

It was stipulated that Government's Exhibit 51 for identification is the original form which the defendants Exhibit AA was photostated.

By the Witness:

I am familiar with Government's Exhibit 51 for identification; it is a list of employees and their rates of pay; I am familiar with its function in the organization; [232-c] that was for the distribution of the productive labor and engineering hours so that they could be charged correctly into the books. These numbers at the top of the page are the different account numbers in accordance with the contract. The figures in handwriting after the names of the employees represent the rates of pay per hour;

(Testimony of Harry Champlin.)

they were made up by me and are in my handwriting; the names of two new employees at the bottom of the page are in my handwriting.

That sheet was made up for a period of six or seven weeks, during, I would say, sometime in August, September, October, it was mimeographed and made up by me to the extent described. It was then presented to Mr. Zap who marked on—under each account number where each man was working. The red figures and marks on Government's Exhibit 51 are in the handwriting of Mr. Zap.

Government's Exhibit 51 was then received in evidence.

Q. By Mr. Lavine: Now I show you a letter dated [232-d] Oct. 23rd, all members of Navy—of the engineering department, from Harry Champlin; is that your preparation and did you send that to all the members of the engineering department?

A. Yes, sir, yes, sir.

(Defendant's Exhibit GG was received in evidence, and read to the jury by Mr. Lavine.)

I am familiar with Government's Exhibit S in evidence, a letter from the University of Washington, dated August 25, 1942. I saw it when it was delivered to the office of E. F. Zap in the course of the mail. At that time it did not have these pencil markings on it in the margins on both sides; these pencil notations are in the handwriting of Mr. Zap. On the carbon copy in Government's Exhibit 16 in evidence.

(Testimony of Harry Champlin.)

The inked figures in handwriting were not on that document when I first saw it; I have seen it before in connection with the previous Exhibit, Government's Exhibit No. 8. When I first saw it, it did not have those figures on it. Those figures are in the handwriting of Mr. Zap. I saw him put them there. [232-e]

Q. By Mr. Maury: Mr. Champlin, did you ever get control of E. F. Zap's organization?

A. No, sir.

By the Witness: Mr. Zap called me over for some insurance figures regarding this flight test. There were several insurance figures. There was the insurance on the life of the pilot. There was insurance for the crash, and I think if I recall correctly ground coverage insurance. They were figures furnished me by an insurance underwriter. I don't recall how much those figures totaled. I would [232-f] hazard a guess—I don't recall, but I think it was somewhere around three or four thousand dollars. It may have been two or it may have been four. I don't know. That discussion or that request for those figures related to an estimate of the cost of insurance for the flight test. I had a typewriter of my own, and used to type up figures quite regularly, and statements from time to time on my own typewriter. And my customary way of typing was to type with caps—not always, no—I wouldn't say a great deal, no. No, I think I would use lower case letters more. [233]

(Testimony of Harry Champlin.)

Los Angeles, California, Wednesday, April 14, 1943.
9:00 A. M.

Harry Champlin,

called as a witness by and on behalf of the Plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination
(Resumed)

By Mr. Lavine:

In connection with all these books and records which I kept from time to time, those were always open for inspection. Mr. Zap did instruct me to conceal books of account. In September, 1942, Mr. Zap told me I was not to show these books to the Navy auditors again; that if the Navy auditors wanted to see anything, they were to come to him and he would tell them what he wanted to.

I believe I told Mr. Byars about that after the whole thing came out, about the time of Mr. Zap's arrest. I never did conceal any books from Mr. Byars at any time.

In addition to Mr. Byars, other Navy auditors around were a Mr. Ted Balzer, and I believe Mr. Greenfield; a Lieutenant Minor; there was another Navy auditor—I just can't recall his name at the present time.

Mr. Balter: Last night the witness said he was tired and could not speak up, now this morning he is not tired and I still cannot hear him, and I have

(Testimony of Harry Champlin.)

moved up here where I [234] hoped to hear him.

The Court: You will have to speak louder.

The Witness: There was one other Navy auditor, I don't recall his name at the present time. There were at least five Navy auditors making inspections in there; they were making cost inspections. Mr. Greenfield was there for a considerable period of time but the exact time I couldn't say. Mr. Byars was the man that had charge of those books. I don't believe Mr. Greenfield spent weeks there. I was there, yes. He sat outside so I didn't see what he was doing.

By Mr. Lavine: Let's get down into the month of June, July, August and September of 1942.

The Witness: I am not sure, but I don't believe Mr. Greenfield was there during June. Navy Inspectors Mr. Balzer and Mr. Byars were there. I saw them auditing the books. I saw them check up on the various items, item by item, in the books. It was a matter of days they spent checking item by item. Then after they finished the auditing of those books they turned them back to Mr. Browne; he had charge of them—Mr. Cedric Browne, the certified public accountant, that I refer to now.

During the month of September, 1942, I knew they were auditing the books, and I knew they were making a check of the accounts. I couldn't tell you how much time they spent [235] because they were working under Mr. Browne. I know they were there. I believe Mr. Greenfield was there during

(Testimony of Harry Champlin.)

the month of September. They checked through the books and made their audit; then turned the books back to Mr. Browne, that is what I understand.

At that time different auditors, they came in: there was Mr. Byers, Mr. Balzer, and then there were two other Navy auditors, I cannot remember their names.

From July on until Mr. Zap's arrest in November, I signed all the C4 forms. Those C4 forms were made out in accordance with the books. I made out my request under C4; that is, I signed the request and then submitted it to a Navy [235-a] auditor. That Navy auditor would either approve it or disapprove it. Now, after he would approve of it he would send back a C5 form. I don't remember just the sequence of the numbers but I believe it was a C5 form that they sent back. And then I would turn that over to Mr. Browne for instructions as to what to do. When that came back they never came back to me, they came right directly to Mr. Browne, and then Mr. Browne directed how the items should be billed. As to the bills being made out on a pencil notation and Mr. Browne telling us how to make out the bills, they didn't come back to me, so I just don't know the form they took.

I couldn't give you a proportion, but the actual entries are in my handwriting in the books there. All of the entries were not made by me but I did make a good many of them, and then there are some entries made by Mr. Cedric Browne, a certified

(Testimony of Harry Champlin.)

public accountant, from July until September Mr. Browne and Miss Boyle made the entries.

I don't recall whether I typed Exhibit 19, this charge here for flight test at Daggett. I remember writing out this in longhand and I believe somebody else typed it. I didn't make up the C4 forms. I believe I did sign a C4 form asking that the item be examined for audit.

Q. By Mr. Lavine: And you recognize the pencil notations of Mr. Cedric Browne?

A. I do not.

Q. Is that the pencil notations of Mr. Cedric Browne? A. Yes, sir. [236]

Q. And this is the form C.A.S. 5 you were using—that the Navy was using in connection with the business of Edward F. Zap? A. Yes, sir.

Mr. Lavine: I offer this in evidence as the defendant's exhibit next in order.

The Clerk: HH for identification. HH into evidence?

Mr. Lavine: Did you have an argument with Mr. Zap in July, 1942?

The Witness: We had small disputes all along. [237] Subsequently, before Mr. Zap left for Washington, he put Mr. L. E. Weaver in charge. I may have asked Mr. Zap when he put L. E. Weaver in charge whether Mr. Weaver was going to be over me. I don't remember asking it, but it is possible that I did.

Q. And then after Mr. Weaver was put in charge

(Testimony of Harry Champlin.)

you went to Mr. Weaver's draft board and told them to lift his classification, did you not?

A. No, sir.

The Witness: Mr. Weaver was left in charge, and by this time I was aware of the mis-charging in the books in accordance with Mr. Zap's instructions.

Mr. Lavine: I object to that.

The Court: Just what you said. The question of counsel is what you said to these people.

The Witness: I took Mr. Weaver and showed him——

The Court: All right. Talk to the jury.

The Witness: Showed him the books and let him draw his own conclusions.

The Court: Now, that is all you did, was it?

The Witness: At first, and then they drew in the men and talked the whole thing over, and I told them just how matters stood.

Q. By Mr. Lavine: You said at that time, didn't you, to several of the employees, that you were going to be in [238] charge of the Zap plant?

A. I don't recall saying that; no, sir.

Q. Isn't it a fact that on the very day that Mr. Zap was arrested that you posted a notice in the place and you told various employees that you were then in complete charge; and you were going to be the boss from then on?

Mr. Binns: I object to that as a compound question, your Honor.

(Testimony of Harry Champlin,)

The Court: Yes, too many things involved in it. I will permit the question if it is split up; and also, counsel, you should present the notice, if you have it, to the witness.

Mr. Lavine: I haven't it.

The Court: Has the Government the notice?

Mr. Binns: No.

Mr. Maury: I never heard of it before, your Honor.

The Court: Ask the question first, just split it up, counsel.

Q. By Mr. Lavine: Did you post a notice to the various employees?

The Court: On the day Mr. Zap was arrested.

The Witness: I believe Mr. Weaver posted a notice.

Q. By Mr. Lavine: Did you post a notice? I didn't ask you about Mr. Weaver.

A. I don't remember that. I don't believe I did.

Q. You don't remember that? [238-a]

The Court: Now, he has answered it. He said he didn't.

Mr. Lavine: All right. Exception.

The Court: You see, it is an argument with counsel. Proceed.

Q. By Mr. Lavine: You told the various employees then that you were going to be in charge, didn't you?

Mr. Maury: Objected to, to various employees

(Testimony of Harry Champlin.)

makes it a compound question. No time or place fixed.

Mr. Lavine: B. C. I am talking about the time he posted these notices on November 5, 1942.

The Court: I will permit the question. Go ahead. Did you tell any of the employees there you were going to be in charge, is counsel's question?

The Witness: Yes, and I would like to explain.

The Court: Go ahead. Explain.

The Witness: Commander Smith, and the Navy Intelligence, when Mr. Zap was arrested, told me——

Mr. Lavine: No.

The Court: No, no, you can't tell that.

The Witness: ——said I was to be——

The Court: No, no.

The Witness: I am sorry.

The Court: You can't do that. That is hearsay, anything they told you. This now is what you told the employees, any of the employees about being in charge.

The Witness: I told them I was there in the Navy's [238-b] interest.

The Court: All right. Anything else? Counsel's direct question is did you tell them you were in charge of the business? That is Mr. Lavine's question.

The Witness: I didn't tell them I was in charge of the business; no, sir.

The Witness (continuing): I told the various em-

(Testimony of Harry Champlin.)

ployees then that I was going to be in charge. I would like to explain. I told them I was there in the Navy's interest. I didn't tell them I was in charge of the business; no, sir.

Q. By Mr. Lavine: You told them you were going to run the place from then on, and they had to take orders from you?

A. No, I don't think I said that.

Q. I will ask you specifically if you did not on that occasion tell Miss Ethel Boyle you were now in charge and that she would have to take orders from you?

A. No, I don't think I said that; no, sir.

Q. I will ask you if you didn't state specifically to Marion Israel you were the boss from now on?

A. No, I don't recall saying that either.

Q. I will ask if you didn't state to Mr. L. E. Weaver that you were in charge?

A. May I ask in charge of what? [238-c]

Q. In charge of the business, in charge of the office and in charge of the business.

A. No, I don't remember saying that to Mr. Weaver there.

Q. You remember that Mr. Zap called up on the telephone? Did you answer the phone?

A. No, sir.

Q. In the presence of Mr. Myerson, of the F.B.I.; Mr. L. E. Weaver, and yourself, Mr. Weaver received a phone call and then turned to you and

(Testimony of Harry Champlin.)

said—and said, "You are fired. Mr. Zap has fired you"? A. I recall that.

Q. And didn't you then state, "He can't do that to me. I am in charge," or words to that effect?

A. I believe, yes. May I explain that, your Honor?

The Court: Yes.

The Witness: I was requested to look out for the Navy's interests, that nothing was removed.

Mr. Lavine: I object to that as a self-serving statement.

The Court: Did you say this to Mr. Weaver?

The Witness: I told Mr. Weaver that Commander Smith told me to stay there and see Mr. Zap's men removed nothing from the office.

The Court: All right.

The Witness: I was in charge to see that nothing was removed from the offices.

The Court: That was a part of the same conversation [239] as counsel referred to with Mr. Weaver?

The Witness: Yes, sir, that is correct.

The Court: All right. Go on.

Q. By Mr. Lavine: And didn't Mr. Myerson, of the F.B.I., then state to you that Mr. Zap is still in charge of the business, and you will have to obey orders of Mr. Zap?

A. I believe Mr. Myerson did say that; yes, sir.

Q. And then didn't you then and there continue

(Testimony of Harry Champlin.)

to remain for a little while in spite of that order and refused to get out?

A. I don't know that I refused to get out. I did leave a little later.

Q. Then you came back again, didn't you?

A. Oh, yes, I came back.

Q. As a matter of fact, you put in a claim for wages for that particular time, didn't you?

Mr. Binns: I object to that, your Honor.

The Court: That is sustained.

Q. By Mr. Lavine: Isn't it a fact, you appeared before the State Labor Commissioner sometime in November or December of 1942, in the presence of the State Labor Commissioner, and Mr. Zap, and demanded wages for this period of time?

Mr. Binns: I object to that question.

The Court: Sustained. I don't think that has got anything to do with this case. Let's try one case at a time. [240]

Mr. Lavine: I want to bring out his interest or bias.

The Court: I am not going to try a labor case here.

Mr. Lavine: No, your Honor, but I want to bring out his animus.

The Court: I permitted you to go at great length, counsel, and you know what matters are entirely outside the record.

Mr. Lavine: I think this is important. May I make an offer of proof then, your Honor?

(Testimony of Harry Champlin.)

The Court: Yes, you may make an offer of proof.

(The following proceedings were had at the bench outside the hearing of the jury:)

Mr. Lavine: I offer to prove at this time that the witness, Mr. Champlin, appeared before the State Labor Commissioner and in November of 1942, and Mr. Champlin, and Mr. Zap, and Mr. Devore, and the State Labor Commissioner, being present; and at that time he made a demand for wages covering this period of time when Mr. Zap had been in the East, and for the subsequent period after he was discharged; that in that proceeding Mr. Zap stated he was not entitled to receive any money for this period of time, and that Mr. Devore stated that he could not be paid for that period of time; and he said that he was working, and in proof of that he produced checks on the E. F. Zap Company, which he himself had signed, and which were not signed by Mr. Zap; he produced those checks in support of his alleged claim for the time [241] that these occurrences were going on, immediately after Mr. Zap left and while he was gone East and after he returned.

Mr. Maury: To which the Government objects as immaterial, irrelevant, incompetent, outside the issues, and indistinct and vague as to time.

The Court: It is the opinion of the court that you cannot show bias and prejudice because of

(Testimony of Harry Champlin.)

dispute between an employer and an employee about wages; certainly any employee can bring an action to recover wages, and the employer can dispute it; and the offer of proof here does not show anything about a dispute between Mr. Zap and this witness with reference to wages. All right.

Mr. Lavine: The hostility and state of mind of Mr. Champlin. Exception noted.

The Court: There is absolutely no hostile state of mind shown in this offer of proof, according to this court; and the court wants to repeat again that he cannot see how you can infer a hostile mind when a laborer brings an action to recover wages against his employer; he has that right, and every laboring man has, and the right of an employer to resist it if it is not fair. Exception allowed to defendant.

(Further proceedings were now resumed within the hearing of the jury, as follows:)

The Witness: After Mr. Zap went to Washington and for the two weeks subsequent thereto, or at least until November 5, 1942, when he returned, I held frequent conferences [242] with people in the office. I believe I told various employees in the office that Mr. Zap was going to be arrested, yes, sir.

Q. By Mr. Lavine: And you told them that he was going to go up for 163 years, or words to that effect?

The Witness: No, sir.

Mr. Binns: I object to that, your Honor.

(Testimony of Harry Champlin.)

The Court: He says he didn't.

The Witness: I made out an affidavit for a search warrant for the F.B.I. I don't recall whether it was an affidavit to search his place of business, or his home.

Q. By Mr. Lavine: As a matter of fact, you made three affidavits, didn't you? I am not going into the substance, your Honor, just the fact that he did do such an act.

Mr. Maury: I will stipulate it is a copy of the original, and is in possession of the United States Commissioner's files, Mr. Lavine.

Q. And you told the employees while you were doing this that after Mr. Zap's arrest you were going to be in charge of the business?

A. I don't remember making such a statement, Mr. Lavine.

Mr. Hanley and I made a trip to San Diego while Mr. Zap was gone. We saw Captain Zeigler in San Diego. I made a trip to see Commander Smith and I saw Commander Smith in company with Mr. Hanley.

Q. By Mr. Lavine: Did you do that at your own expense [243] or at the expense of Mr. E. F. Zap?

A. That is a rather difficult question to answer. I would like to qualify that, please.

Q. Did you pay your own expenses or did you charge it to E. F. Zap?

The Witness: I don't know who has paid for

(Testimony of Harry Champlin.)

that trip to San Diego, I don't know: I went in Mr. Hanley's car and I don't know that Mr. Hanley has been reimbursed for the mileage, or anything.

The Court: Just yourself: did you receive any money for expenses?. Did you receive any money for expenses from Mr. Zap? That is the question.

The Witness: No, I didn't.

The Court: All right.

The Witness: No.

Q. By Mr. Lavine: Did you receive any money for reimbursement for your trip to Commander Smith's office? A. No, I don't believe I did.

Q. By Mr. Lavine: Did you ask Mr. Hanley at that time to phone to Washington and see what arrangements could be made to take over the business of Mr. Zap, on or about October 27, 1942, during Mr. Zap's absence?

The Witness: I don't recall I was the particular instigator in that telephone call—no, sir.

Q. By Mr. Lavine: You heard such a telephone call made, didn't you? [244]

A. I know such a telephone call was made: yes, sir.

Q. And you okehed the bill for the payment of that telephone call, didn't you?

A. I okehed a bill for payment of a telephone call to Mr. Harold Dale, from E. W. Hanley, to Washington, D. C.

Mr. Lavine: I now offer this as next in evidence.

The Court: It will be received.

(Testimony of Harry Champlin.)

(The document heretofore marked for identification as Defendants' Exhibit II was received in evidence.)

Mr. Binns: I object to the introduction of that in evidence, your Honor. It is not plain to me that is connected with the telephone call that the witness just testified concerning.

The Court: Clear it up, counsel. You may ask the question. Clear it up.

Q. By Mr. Binns: Mr. Champlin, you have just testified concerning a telephone call which Mr. Hanley made to Washington? A. Yes, sir.

Q. Counsel has just shown you a receipt?

A. Yes.

Q. Is that the bill for the telephone call which you have just testified about to Washington?

A. I believe it is.

(The document referred to was received in evidence and marked Defendants' Exhibit JJ.)

[245]

The Witness: I did not at any time notify Mr. Zap that I heard rumors that he was about to be arrested.

Recross Examination

By Mr. Lavine:

The Witness: With reference to the defendant's exhibit GG in evidence, the condition I described in that exhibit existed from the first day that I went in there to take care of the books; I wish to say a

(Testimony of Harry Champlin.)

word about that: the unbalance between the cost price and the fixed fee ledgers was so apparent, but not being an engineer, I didn't know how these men's time should be charged, so I asked Mr. Weaver and Mr. Weaver went around and inquired from the different men and this was drawn up as a result of that.

/

HILTON JACK BYARS,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

By Mr. Binns:

I am employed at the office of the Cost Inspector at the Timm Aircraft Corporation and Interstate Aircraft and Engineering Corporation, as senior accountant. I was senior accountant at the office of the cost inspector at Douglas Aircraft Corporation, and the cost inspection of E. F. Zap was under the cognizance of that cost inspector.

I entered into that position May 25, 1942. I first [246] visited the Zap establishment some time in the first of June, 1942. I would say some time within the first 15 days of June.

(Witness describes E. F. Zap's offices and building): I wouldn't specifically call any one of them the main office. I would call that the front office. The one maybe you have reference to now is the side office, the one on the south side, where the drafts-

(Testimony of Hilton Jack Byars.)

men were. To the best of my recollection mostly in the side office there were draftsmen's tables, with the exception of one desk, somewhat in the center of the [246-a] room, that was occupied by Cedric Browne, the accountant, the auditor for the company. The books were kept both places, so far as I know. I mean they were sometimes at one place and sometimes at another. Generally speaking they would be kept either at Mr. Browne's or Miss Boyle's desk. That might not always hold true. They might possibly be anywhere within the office, anywhere in the organization.

Q. Now, then, you have another office. I think you have referred to it as the back office.

A. I can give you a general idea about September or October, 1942.

Q. By Mr. Binns: In September or October how were the desks arranged in that office?

The Witness: The first desk after you go in the door was a desk occupied by Mr. Champlin, and then flush against that but facing in the opposite direction was the desk occupied by Mr. Hanley; and then facing in the opposite direction, about four or five feet away from Mr. Hanley's desk, was Harold Dale's desk; then flush against that, but facing in the opposite direction, was Mr. Zap's desk.

Then on the side, that would be the east side, there was, I believe it would be called a draftsman's board, or a saw-horse, or whatever you call them there; and just south of that, up towards the door,

(Testimony of Hilton Jack Byars.)

would have been the safe and maybe some other cabinets or something I wouldn't recall exactly.

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In connection with my duties as a civilian auditor for the Navy, I audited the books of E. F. Zap. The period of time during which I audited his books would be approximately from some time during the first part of June, until some time during October or November.

The Navy had assisting me in that audit, part of the time, in 1942, Theodore Balzer, Navy Auditor. Then at various times additional ones from the office from which I worked would assist. Among those were Greenfield, Sam Quint, and Douglas Reevers, John C. Watkins; and I don't recall every one that did any work at all on the audit. All those men whose names I have mentioned would have worked under me in the conduct of an audit at Mr. Zap's. I have conducted audits at Zap's office. I work under Lt. Minor.

It wouldn't be a regular procedure, depending on the type of audit to be made. An overhead audit, so-called, might be made once every six months or three months, and cover the entire period in one audit; that is maybe it would take two or three weeks, or whatever it might take. An audit of a payroll for one week, for instance, might be done every week, and might be done at two week periods. There was no regular procedure. That is, we didn't always audit for the same period at each audit. I

(Testimony of Hilton Jack Byars.)

personally participated in the two types of audits I have described. I personally participated in audits in connection with the Navy control account. I personally participated in audits in connection [248] with cost-plus fixed fee contract items.

Q. Now, then, Mr. Byars, I am going to ask you to examine a group of exhibits that have been marked for identification and identified as books of E. F. Zap, and trace certain items for us through those books.

Government's Exhibit No. 52 for identification is the check mentioned in Government's Exhibit 26 in evidence. It would not necessarily have been audited in the audit of Government's Exhibit 26.

(Government's Exhibit 52 was received in evidence.)

I have seen Government's Exhibit 26 in evidence before; it was submitted to my office. In regard to Government's Exhibit 26, I refer to certain memoranda that I have.

Voir Dire

By Mr. Lavine:

The Witness: This particular memorandum was made on the 24th of November 1942. I certainly did not make this at the time these various items were being entered. The schedule was prepared after both September and October had passed and was not necessarily a chronological recordation of these items.

(Testimony of Hilton Jack Byars.)

Redirect Examination

Resumed by Mr. Binns:

The Witness: In order to definitely identify the par- [249] ticular items, I will have to add them up and see when I get this total to identify this particular item.

The Court: Let the record show Mr. Lavine's objection is on the record, and Mr. Lavine's objection is overruled and exception allowed Mr. Lavine. All right. Proceed.

Mr. Lavine: In order that our record may be complete, it would be on the grounds there is no foundation; that it is a conclusion of the witness; and that it is not the best evidence. On the other grounds which we had heretofore stated, and exception noted.

Q. By Mr. Binns: Mr. Byars, can you tell us if, among these items included in Exhibit 26, was an item of reimbursement for payment to the University of Washington for wind tunnel expenses in the amount of $1906 and some odd dollars?

A. There is a payment included in $1909.62.

Q. I see. And can you look at the books and records of Mr. E. F. Zap and see if such an entry is made on his books?

Mr. Lavine: I object, and an exception to the ruling?

The Court: Yes.

The Witness: There is an entry in Exhibit 38, page IR-10, in the amount of $1909.62, under the

(Testimony of Hilton Jack Byars.)

column 26-0; it was subsequently posted to Exhibit 41, page 1, of clearance [249-a] account 26-0, under date of September 30, University of Washington, $1909.62.

Q. Now, can you look at the invoice record and tell us the figure $1909.62 represented a total of an invoice received, or only a part of an invoice received?

A. The invoice record, Exhibit 38, indicates that it is a part of an invoice for $5,295.56.

Q. Can you look at the books and records of Mr. Zap and tell us wherein was charged the balance of the invoice for 5,000 some odd dollars?

A. It is charged in Exhibit 38, on page IR-10, under account 3-0, $3,385.94, and that was posted to the Exhibit 41, page 1, of account 3-0, and under date of August 28th, University of Washington, $3,385.94.

Q. Exhibit for identification, 41, is entitled "Job cost record;" now, can you tell us whether that is job cost ledger cost plus?

Mr. Lavine: I object to that as calling for the conclusion or opinion of the witness. He did not make the ledger and it was not kept by him.

Mr. Binns: He has audited the books.

The Court: Just what the books show. Just limit it to that.

The Witness: All the accounts in this ledger, Exhibit 41, were used to accumulate charges under

(Testimony of Hilton Jack Byars.)

the cost plus fixed fee portion of both contracts; that is, under 83142 and NXs- [250] 4105.

Q. By Mr. Binns: Can you go back to the invoice record and find that item for five thousand some odd dollars? A. Yes, sir.

Q. Is there a notation that item is charged to an account, or to an item known as project 15?

A. There is none. In connection with my auditing of the books of Edward F. Zap, Aeronautical Engineers, there was an account known as project 15. Such account appears in Exhibit 40, the page is unnumbered; it shows—here is a writing on page number—page 2, payroll. From October 8, 1942, to October 14, 1942, there is a column headed "Project 15. Account 50-0." The total of that column is $103.46. It was next entered in Exhibit 39, under account 200, entitled "factory ledger plant 2." Under date of October 23rd, and the notation is project 15—50-0—$103.46.

Q. Now, then, Mr. Byars, is there any other entry previous to the period October 8th—pardon me—October—previous to October 23rd, wherein that account appears? Pardon me—that item appears?

A. That item? Do you mean the $103.46?

Q. No, I mean project 15.

A. In Exhibit 39, account 11, the work in process, job cost ledger, shows under account 50-0, an amount of $283.79, under date of October 31st, a total of that column, accumulation of charges to that account, is $289.76. [251]

(Testimony of Hilton Jack Byars.)

I understand you to mean in the job cost ledger was there an account, in this particular job cost ledger, showing the details of the charges. What I have reference to there is no such account in there, to my knowledge. I never saw one during the course of the audit.

This bill of $283.79, which appears in the account "Work in Process," in Government's Exhibit 39 for identification was posted from Exhibit 38, page J-62, which is the journal, transferring that amount, $283.79 from the account factory ledger to "Work in Process Job 50-0."

As to any other entry prior to 10-31-42, which concerns project 15 in the books of E. F. Zap, there is an entry in Exhibit 40 that was previously referred to, that is page 2, payroll period from October 8, 1942, to October 14, 1942; that is $103.46, covering that one week's payroll, the same exhibit 40, this page is not numbered, but says "Payroll, period from October 15, 1942, to October 21, 1942," which would be the subsequent week—there is an amount of $180.33, under project 15, 50-0.

Project 15 does not appear upon the books and records of E. F. Zap prior to October 8, 1942.

With reference to Exhibit 25 in evidence, and particularly the 3rd page thereof, (the substance of which was read to the jury), that item was attached to Exhibit 25 when it was received in my office. This item was handled in the [252] same manner as the 4th page of Exhibit.

(Testimony of Hilton Jack Byars.)

By Mr. Lavine:

The Witness: That exhibit came to my office in the form that it is here; all of the documents now attached were altogether at my office and I saw them there.

Looking at the books and records of Mr. Zap I find that the item represented by page 3 of the Exhibit 25 appears thereon in Exhibit 38, CR page 42, check No. 260 in the amount of $500 to E. F. Zap, preflight test, that shows also in Exhibit 41, page 1, of the account 3-10, E. F. Zap, tunnel test, with the posting reference Cr-42, $500.

That entry is in connection with the entry I previously traced, namely, the invoice received from the University of Washington in the amount of five thousand and some odd dollars.

In connection with Exhibit 30 in evidence which now is read to me as follows: "Public Voucher, for cost plan contracts, 11th Naval District, San Pedro, California," the one line "schedule C, 1675.81, A part of a total of $10,829.77. Document 10, Schedule C, Edward F. Zap, schedule of direct charges, contract NXs-4105."

Reading from one line on that page "June 29, 1942, electric power and wind tunnel, $500." Now, reading the 17th, "Edward F. Zap, 1005 Broxton Avenue, West Los Angeles, California. June 29, 1942. Invoice. Sold to United States of America Navy. We charge your account with a direct charge [252-a] as follows: May 8, 1942, reimburse-

(Testimony of Hilton Jack Byars.)

ment E. F. Zap for advance to power company for power used at the University of Washington, Seattle, Washington, wind tunnel, in ascertaining certain vital stress information in connection with item 1, lot 2, of contract NXs-4105. By paying power bill direct a substantial saving in the wind tunnel charges was made—$500. Certified correct and just payment not received. Edward F. Zap."

I examined the books and records of E. F. Zap and ascertained that public voucher No. 2808, the first page of Government's Exhibit 30 in evidence, was in Exhibit 38, page No. C-70, which is the record of cash received. Under date of July 11, 1942, there is an entry of cash received, $10,829.77, United States Navy, and it is credited to the accounts receivable, U. S. Navy, that being the same amount as the voucher Exhibit 30.

This check, dated May 9th, payable to E. F. Zap in the amount of $500, marked Exhibit 37 in evidence, appears upon the books and records of E. F. Zap in Exhibit 38, CR-48, check No. 384, amount $500, with the notation "reimbursement E. F. Zap, account of wind tunnel test, design job 261." That entry was next posted to Exhibit 41, page 41, of 26-1, under date of May 8th; notation, E. F. Zap, wind tunnel test, $500.

That sum was withdrawn from that amount and posted elsewhere as follows: "In Exhibit 38, page J-38, is an entry charged accounts receivable, U. S. Navy, $10,829.77, and [252-b] credited to Navy bill

(Testimony of Hilton Jack Byars.)

cost, contra, $884.82, $8,814.24, which total $10,829.77. The distribution of those three amounts are account 26-0, 26-1, 26-2; that amount is the same amount as the voucher which included the $500 item.

Check No. 2502, of Exhibit 37 in evidence in the amount of $1,000, dated July 15, 1942, payable to E. F. Zap, appears upon the books and records of E. F. Zap in Exhibit 38, page CR-52, check 2502, $1000; E. F. Zap wind tunnel expenses.

This was next posted to Exhibit 41, page 2, of account 26-1, under date of July 15th, E. F. Zap wind tunnel expenses, $1000.

This check was received as Government's Exhibit 35 in evidence.

Concerning the sheet in Exhibit 37 in evidence, starting "Certificate of withdrawal from Navy control account, contract NXs-4105," I have seen that before both at my office and at Mr. Zap's office. The check which has just been admitted in evidence in the sum of $100 is included in this check No. 1.

Neither this item of $1000, which I have just described, nor the previous item of $500, which was part of Exhibit 30, were a part of the bill which was received from the University of Washington.

With reference to Government's Exhibit 53 for identification, this is the item which accompanied Government's Exhibit 37. [252-c]

(Government's Exhibit 53 was received in evidence.)

(Testimony of Hilton Jack Byars.)

Q. By Mr. Binns: Mr. Byars, I show you Government's Exhibit 19 in evidence, calling your attention to the second page thereof, which reads as follows: "Public voucher for cost plus contracts. No. 36062." And then skipping down a ways, for work on a cost plus and fixed fee basis, under contract, then October, 1942, other direct charges, $4,300.

Can you look in the books and records of Mr. E. F. Zap and ascertain whether the public voucher, which is the second page of Government's Exhibit 19 in evidence, was paid by the Navy to E. F. Zap?

[2-d]

A. In Exhibit 38, page C-23, which is a record of "Cash received," is an entry under date of October 24th, accounts receivable, U. S. Navy, 83142, entry No. 40, $4,300.

Q. Can you trace that entry back into the account from which it was posted?

A. That entry is posted to Exhibit 39 as a part of a total amount of $45,407.42, to offset the charge of $4,300. I identified this account as No. 6?

Q. No.

A. This amount was posted to the account Exhibit 39, page 6, is a part of a total amount of $45,407.52. The step before that was Exhibit 38, page J-60, record of journal entries, is an entry charging accounts receivable $4300, accounts receivable, U. S. Navy, and crediting Navy cost/bill, contra, job 3-15, $4300; that Navy cost bill, contra,

(Testimony of Hilton Jack Byars.)

is the offset to the charges to these accounts in the job cost ledger under the previous account numbers, 3-15 being one of them.

Q. Did that item appear in 3-15?

A. Yes, in Exhibit 41, page 1, of 3-15 is an item of $4,000, under date of October 2nd, with the date in parenthesis 9-23-3, William H. McAvoy, $4,000. There is an additional amount under date of October 9th, E. F. Zap, $250. There is an additional amount under date of October 13: petty cash, $114.97, which included a $50 item which, with the other $250 and the $4,000 makes up the $4300 item.

[253]

Q. I show you this check in the amount of $4,000, which is Government's Exhibit 7, and ask you is that the $4,000 item which represents the item you have just read? A. It does.

Q. These two checks have been withdrawn from the Exhibit 7. May I have them specially marked, Government's Exhibit 37 for identification?

The Clerk: These two checks here, Government's Exhibit 37 for identification.

Q. By Mr. Binns: Mr. Byars, I show you this check marked 37 for identification in the amount of $250, and ask you is that the check which supports the $250 item you have just read? A. It does.

Mr. Binns: Could that be admitted in evidence at this time, your Honor?

The Court: It may be.

(The document heretofore marked for identi-

(Testimony of Hilton Jack Byars.)

fication as Government's Exhibit No. 37 was received in evidence.)

Q. By Mr. Binns: Now, then, Mr. Byars, did you conduct an audit before the issuance of the public voucher, which is the second page of Government's Exhibit 19 in evidence? A. I did.

Q. In connection with that audit was the fourth and fifth pages of Government's Exhibit 19 submitted to you by [254] the E. F. Zap Company?

Mr. Lavine: I object to that as irrelevant, incompetent and immaterial.

The Court: Overruled.

Mr. Lavine: Exception.

The Witness: In connection with my audit of that voucher the fourth and fifth pages of Government's Exhibit 19, in evidence, were received by our office in the regular course of business. Looking at a sheet of paper on the letterhead of E. F. Zap, Government's Exhibit 6 for identification, that document was also received by our office in the regular course of business in connection with the audit, the second page of the Exhibit 19 in evidence.

Mr. Binns: I would like to read these three documents to the jury, if I may, your Honor.

(Reading)

"October 16, 1942. Edward F. Zap, 1005 Broxton Avenue, West Los Angeles, California. Invoice 51. Sold to the United States of America—Navy, contract 83142. We charge your account with direct charges as follows:

(Testimony of Hilton Jack Byars.)

Direct charges as per list V-73, $4,300. Certified correct and just payment not received. Edward F. Zap."

"I, Edward F. Zap, do hereby certify that I have paid to William McAvoy the sum of $4,000 as payment for flight test of OS-2-U, under terms of contract No. 83142, this being paid by my check 4679, dated October 13, 1942. Edward F. Zap." [255]

"On the letterhead of Edward F. Zap, Aeronautical Engineers. October 11th, 1942. Los Angeles, California. E. F. Zap, Zap Corporation. I hereby acknowledge final payment in full covering my services in flight test on Navy OS-2-U airplane on Navy contract No. 83142. William H. McAvoy."

Q. By Mr. Binns: Mr. Byars, I show you this document on the letterhead of E. F. Zap, marked Exhibit 5 for identification—in evidence—and ask you was that document received by your office in the regular course of business in connection with the audit of the second page of the public voucher, which is the second page of Government's Exhibit 19 in evidence? A. It was.

Mr. Binns: May I read that to the jury, your Honor?

On the letterhead of E. F. Zap Aeronautical Engineers.

"October 6th. Received of Edward F. Zap the sum of $300 for excess time in time of flight

(Testimony of Hilton Jack Byars.)

test OS-2-U airplane at Daggett Field, October 6, 1942. William H. McAvoy, 3-15. Okeh. Zap."

Mr. Binns: I would like the record to show the jury is now examining the check No. 2679, check No. 2702, check No. 2794, all payable to E. F. Zap.

May I correct the record to show, your Honor, that the fifth page of Government's Exhibit 19, the number of the check is 2679?

The Court: Yes. [256]

Q. By Mr. Binns: Now, then, Mr. Byars, calling your attention to the first page of Government's Exhibit 19, the public voucher for cost plus contract number 32538, can you examine the books and records of E. F. Zap, and determine whether or not the United States Navy paid—~~made a~~ payment to Mr. E. F. Zap pursuant to that voucher?

A. In the Exhibit 38, page C-23, under date October 14, there is an entry to accounts receivable, U. S. Navy, 83142, voucher 39, $4,818.31. This page C-23 of Exhibit 38 is a record of cash received.

Q. And can you tell us what account posted in that cash received was charged to?

A. It was posted to account No. 6 of Exhibit 39, as a part of the total of $45,470.52. The pencil notation at the side of the detailed amounts making up that $45,000, among which is listed the $4,818.31.

Q. Can you tell us—drawing your attention to the third item appearing on public voucher number—which is the first document in Government's Exhibit No. 19—I strike that.

(Testimony of Hilton Jack Byars.)

Drawing your attention to public voucher—to the public voucher which is the first page of Exhibit 19, and to the item $1260, which is part—which is one of the items whose total is $4,818.31. Can you trace that item of 1260 for me on the books of E. F. Zap?

A. In Exhibit 38, page J-58, is an entry charged to [257] accounts payable, U. S. Navy, for $4,818.31, and a credit, Navy cost bill, contra, job 3-10, $835.41, and job 3-15, $3,982.90.

I trace the item of $1260 into Exhibit 38, on page CR-57, the next account in which it appears, check No. 2683, under date of September 25, check indicated as paid to E. F. Zap, $250. This item was posted to Exhibit 41, page 1, of Account 3-15. This check for $250, dated September 25, 1942, payable to E. F. Zap, No. 2683, marked Exhibit 37, is the check which supports the entry to which I have just referred.

Further tracing the $1260, in Exhibit 38, page CR-59, under date of October 13, check No. 2768, Edward F. Zap, $1010; that amount is posted to Exhibit 41, page 1, of Account 3-15, under date of October 13, E. F. Zap, $1010.

Q. I hand you two checks, Mr. Byars, the first of which is No. 2743, and the second of which is No. 2768, which has just been withdrawn from Exhibit 37 for identification, and ask they may be marked for identification at this time.

The Clerk: Marked as 37 for identification.

(Testimony of Hilton Jack Byars.)

Q. By Mr. Binns: I show you check 2768 in the amount of $1010, payable to Edward F. Zap, marked Government's Exhibit 37 for identification, and ask you is that the check which supports the entry you have just read? A. It does.

Mr. Binns: May the record show that check No. 2683, and check 2768 are now being passed to the jury? [258]

I offer these checks in evidence at this time, your Honor.

The Court: They will be received.

Mr. Lavine: We object as it is irrelevant, incompetent and immaterial, and not within the issues here.

The Court: Overruled.

Mr. Lavine: No proper foundation, your Honor. Exception.

Q. By Mr. Binns: Mr. Byars, I show you a check numbered 2743, dated October 10th, in the amount of $135, to the order of Harry H. Kern & Company, Ltd., marked Government's Exhibit 37 for identification, and ask you does that check appear upon [258-a] the books and records of Edward F. Zap?

A. It appears in Exhibit 38, page CR-59, under date of October 10, 1942, check 2743, Harry H. Kern Company, which is charged to accounts payable.

Will you please trace that check in the accounts payable?

A. The check itself does not show in the record

(Testimony of Hilton Jack Byars.)

of invoices, which is IR-11, of Exhibit 38. There is an entry under date of September 30th, Harry H. Kern & Company, Ltd., $135, which is credited to the accounts payable, and charged to the drawing account of E. F. Zap, $135.

Q. Will you please ascertain whether that entry of $135 was charged to the account of E. F. Zap?

A. In Exhibit 39, account No. 100, entitled drawing account, Edward F. Zap, under date of September 30th, with the posting reference, IR-11, is amount, $158.88, which is posted from Exhibit 38, which is the total of the column of the drawing account, Edward F. Zap, which includes the $135.

Mr. Binns: I ask, your Honor, that be admitted in evidence at this time.

The Court: It may be admitted.

(The documents attached to Exhibit 37 are here now admitted in evidence.)

The Witness: I am not acquainted with Harry H. Kern & Company, Ltd. They are in the insurance business. [259]

Q. By Mr. Binns: Mr. Byars, will you turn to the account No. 3-15 in the books and records of E. F. Zap? I would like to read the heading of this account into the record, your Honor.

The Court: Proceed.

Mr. Binns: "Page 1. 3-15, flight test."

Mr. Byars, I ask you now to examine that account and see if there are any other items therein charged which represent checks which have been made out to

(Testimony of Hilton Jack Byars.)

E. F. Zap, in addition to the five checks which you have just traced into that account?

Mr. Lavine: I object to that as irrelevant, incompetent and immaterial.

The Court: Overruled.

Mr. Lavine: Exception.

The Witness: The account does not indicate any additional checks.

Q. By Mr. Binns: Calling your attention to the third document in Government's Exhibit 19, in evidence, was that document submitted to your office in the regular course of business for audit in connection with the public voucher which is the first document in this exhibit?

Mr. Lavine: Object to that as calling for a conclusion or opinion of this witness, no proper foundation laid.

The Court: Overruled.

Mr. Lavine: Exception.

The Witness: It was. [260]

The third document in Government's Exhibit 19 in evidence was submitted to my office in the regular course of business for audit in connection with the public voucher which is the first document in this exhibit. [260-a]

Cross Examination

By Mr. Lavine:

As to becoming very friendly with Harry Champlin; we were business—we had business relation-

(Testimony of Hilton Jack Byars.)

ships. We were business friends, but not socially. Certainly, we went out to lunch together. I have no idea how frequently we went out to lunch together—occasionally. Probably nearly every time I went over there. I did not ask Mr. Zap some time in July, or suggest that I would like to become an auditor at his place of business. I am working as a civilian with the Navy; that is right. I did not suggest that a salary of $10,000 would be very enjoyable to me. I am familiar with Mr. Champlin's handwriting.

The contract 83142 was also split into two parts; certain items were fixed fee and certain items were cost-plus. Items 1 to 6 were fixed fee, and items 7, 8, 9 and 10 were cost plus.

Most of the claims that were made from the Zap concern were made to me; that is to say the first C.A.S. 4 forms came to me. And then if I approved of the item, then I sent back a C.A.S. form. And if I didn't approve of the item, then I sent a 5-A form back. I was constantly checking over these books. I was doing my work in accordance with the best of my ability. I was only permitting invoices to be approved in the event that I found that they were justified and correct for approval. I believed them to be. [261]

I approved the accounts, or I allowed them to be approved when the indications were that the charges were justified. All the items which I approved, the

(Testimony of Hilton Jack Byars.)

indications were, and they were believed to be correct. They were believed by me to be correct.

I testified on direct examination that out of the $5,200 of the bill of the University of Washington, that $1,909 had been paid, and to my knowledge, the balance of that money has never been paid to Mr. Zap by the Navy.

These particular books that I have been looking at and these various entries that I have read are all items of account in Mr. Zap's books. Those books on exhibit there, are not in the Navy books, they are Mr. Zap's books. And they are books that were kept by various persons in Mr. Zap's employment.

Q. By Mr. Lavine: Now you are familiar with the various handwritings on these books?

A. Not necessarily familiar with all of them.

Q. Well, in connection with the item of $1,108.78, will you look at that item and trace it in the books for me again, please?

A. Where do you want me to begin, Mr. Lavine?

Q. The first book that you looked at before. I would have interrupted you, but I couldn't interrupt Government counsel. Just look at the first place you found that $1,108.78. [262]

A. I don't recall where was the first one I saw, but I think it is in this book. I think here was the first entry, on Exhibit 38, page J 32, record of journal. The entry is dated May 31, 1942. It looks like it might be Harry Champlin's handwriting. Looking at the next place I'd find that item; that

(Testimony of Hilton Jack Byars.)

would be included in this total of $8,634.06, on account No. 6 of Exhibit 39. That might be either Cedric Browne's or Harry Champlin's handwriting.

The next place I see that item is on page C-19, of Exhibit 38, under date of June 11, in accounts receivable, U. S. Navy, there is an amount of $8,634.06, which is the same as the amount referred to under Exhibit 39, which included the $1,108.78. It seems to me that this is Cedric Browne's handwriting.

Q. By Mr. Lavine: Now let us look at the item No. 265 that you testified to. Do you recognize that? I think you first saw it in CR-43.

A. What do you mean, item 265?

Mr. Binns: If your Honor please, I would like to object. This is beyond the scope of the direct examination. There is no testimony whatsoever as to whose hand anything was written in on these books.

The Court: Sustain the objection of the Government.

Mr. Lavine: Exception. Now, in order that my record may be clear, I want to identify the handwritings of all of those exhibits that he has examined, as being those of [263] either Harry Champlin or Cedric Browne, your Honor, as showing our side of the case.

And we make that offer of proof at this time.

We offer to prove that each and all of these hand-

(Testimony of Hilton Jack Byars.)

writings which he has examined are either those of Harry Champlin or Cedric Browne.

Mr. Maury: Does the offer of proof include proof by the witness——

The Court: Both of these witnesses were on the stand, counsel had lengthy hours of cross examination, he had every opportunity to show who made the entries, and now he is asking a witness who was asked nothing about the handwriting in any of these exhibits to identify certain handwriting. The Government's objection is sustained. Exception allowed.

Mr. Lavine: All right, thank you, your Honor.

The Witness: In Exhibit 39, account No. 11, there is a column headed No. 50-0. In Exhibit 40, the page is not numbered, payroll period from October 8, 1942, to October 14, 1942, there is a column headed "Project No. 15, 50-0."

In connection with that project, I told the amount of time which that project showed, and the amount of money charged in that column is $283.79.

In connection with the amount of money for which the University of Washington billed Mr. E. F. Zap for $5,200 and some odd dollars, I do not know whether any amount is still owing by the Navy. Of such amount, however, it is not [264] to my knowledge that the Navy has paid the $3,365.

In connection with Exhibit 38, on page J-62, there is an entry dated October 31, 1942, charging work in process, job No. 50-0, with $283.79, under which it states "To transfer payroll to correct account."

(Testimony of Hilton Jack Byars.)

Concerning the item on Exhibit 41, page 2, of account 26-1, an entry under July 15, 1942, E. F. Zap wind tunnel expenses, $1,000, there is a record that the Navy paid that item? this would be included in the first request for withdrawal from the Navy control account.

There is another item for wind tunnel expense for $250, of which I have no recollection, but in looking at check No. 2683, of September 25, and CR-57, Exhibit 38, there is a check drawn to E. F. Zap in the amount of $250. The charge to that was for account 3-15.

Q. By Mr. Lavine: And fixed fee items are subject to re-audit by the Navy so that profits in excess of 7 per cent cannot be allowed to the contractor, isn't that right?

The Witness: The law is in a state of flux now. I would [264-a] rather not make a statement as to the matter of law. I don't know just what the provisions are on the re-negotiations now.

I am familiar with the items of accounting in connection with these Navy contracts. I am familiar with form TD-5000. I am not especially familiar with form IT-3400. I am acquainted with the fact that TD-5000 is incorporated in the contracts of Mr. Zap.

I joined the service as a Navy cost accountant, May 25, 1942. I took on the Zap job sometime in the first part of June, 1942. This was practically my first job as a Navy cost inspector. I familiarized

(Testimony of Hilton Jack Byars.)

myself with all the regulations and rules and directives before I took this job up. I couldn't repeat them verbatim. There might be some rules that would not be clear to me, yes, sir.

Q. By Mr. Balter: Isn't it a fact that you, as well as other cost inspectors, have had constant trouble over the itemization of fixed price and cost plus items?

Mr. Binns: I object to that, your Honor, as not within the issues in this case.

The Court: Sustained.

The Witness: Referring to Government's Exhibit 25, which is the University of Washington wind tunnel test made, and referring to the inspector's stamp, "Material Inspected and Accepted: L. V. Scott"; that would simply mean that as far as the inspector is concerned he has seen the wind tunnel [265] data and has inspected it; that would be my understanding.

I did not make any attempt to call the errors to the attention of Mr. Zap or Mr. Champlin or his auditors. I never did call it to the attention of anybody in the organization; to my knowledge, or to my recollection, I never did.

Redirect Examination

By Mr. Binns:

The Witness: In relation to Government's Exhibit No. 25, at the fourth page thereof, the notation "Material inspected and accepted; L. V. Scott"

(Testimony of Hilton Jack Byars.)

signifies that it had been received by E. F. Zap for the Navy, pursuant to work being done for the Navy.

I am not an engineer; I am not familiar in any measure with the data that is secured from a wind tunnel.

The notation which I have mentioned above, signed by L. V. Scott, would signify to the Cost Inspection Division that wind tunnel data had been received by E. F. Zap; and that that wind tunnel data was pursuant to a Navy contract.

When I testified that the Zap Corporation was my first job, I did not mean it was the first job I had ever had, but that it was the first job I had had for the Navy. Prior to going to work for the Navy, I had approximately eight years of experience as an accountant; four and a half years of it in my own office, and with other business concerns. I am not a certified public accountant. [266]

Recross Examination

By Mr. Balter:

The stamp "Materials inspected and accepted" means that they have been inspected and accepted by the Navy, but the acceptance by the Navy would not necessarily indicate physical segregation from something else that was being performed under the contract.

Q. By Mr. Lavine: Mr. Byars, didn't Mr. Zap

(Testimony of Hilton Jack Byars.)

ask you on occasions if everything was correct and satisfactory to you and the Navy?

The Witness: I don't recall any specific occasion. He may have.

Mr. Lavine: That is all. No further questions.

[266-a]

Los Angeles, California, Thursday, April 15, 1943.
9:00 A. M.

(The following proceedings were had outside the presence of the jury:)

The Court: Proceed, Mr. Lavine.

Mr. Lavine: Well, the first motion I have, your Honor, is a motion for the Government to elect which counts it will now proceed upon, upon each of these four phases of the indictment; and I can direct my motions subsequently to their election of the different counts, your Honor. We have a right now to have an election as to which counts they stand upon. We feel that there is a duplicity and repetition of the subject matter in the first three counts, and in the second group of counts, 4, 5 and 6; and counts 7, 8, 9, and counts 10, 11 and 12; that actually only one offense is charged; and that the Government, which indicated at one time that they may elect some time during the trial, should now make the election as to which counts they will rely upon in presenting those issues to the jury.

That is my first motion.

(Testimony of Hilton Jack Byars.)

The Court: All right, let the Government reply to that.

Mr. Maury: The Government is willing to make an election, your Honor, and asks that as to the defendant Zap counts 2 and 6 be dismissed; that as to both defendants counts 9 and 12 be dismissed; thus leaving the record in such condition that the Government relies upon an election [267] to proceed further under counts 1, 3, 4, and 5, as to Zap alone, and counts 7, 8, 10, 11 and 13 as to both defendants.

Mr. Lavine: Now, we then move, your Honor, in furtherance of this same motion, however, that counts 1 and 3 charge the identical claim; therefore, that the Government should be required to elect which one of those two counts they are going to stand upon; and that counts 4 and 5 are the identical claim involved, and that counts 7 and 8 are the identical claim involved, and that counts 10 and 11 are identical claim; and, therefore, that they should be required to elect which one of each of those groups of two counts that they will now proceed upon; that there being only one claim and that these are a duplication of the claim which is charged in the indictment.

The Court: You contend 1 and 3 are the same?

Mr. Lavine: Yes, your Honor. They involve the same identical claim.

The Court: All right. I will hear from the Government.

(Testimony of Hilton Jack Byars.)

Mr. Maury: The Government urges, your Honor, that accounts 1 and 3 are based on the same statute, constituting different crimes, and one is the presentation of a false claim for reimbursement for expenses; the first section of section 80, of title 18, of United States Code, Annotated. Second is a charge involving the same fact as count 3. I am addressing myself to count 3, pertaining to making false entries upon the books and records of Edward F. Zap: [268] such books and records of Edward F. Zap being matters within the jurisdiction of the United States Navy; that comes under the second concept of the statute involving, and the mere making of false entries in such books is, in itself, a crime; the distinction between the two facets, we might say, of the statute, runs through the indictment, and it runs throughout the case; it also runs through the statute, and, of course, it is elementary that one act might constitute a violation of more than one statute, or more than one portion of one statute; about that there can be no question; so, consequently, under the state of the record; we feel that there is ample evidence to go to the jury upon the counts indicated as different counts; namely, under the first group, 1 and 3; under the second group, 4 and 5; under the third group, 7 and 8; under the fourth group, 10 and 11.

Mr. Lavine: Now, the defendant Zap, your Honor, at this time moves for a directed verdict on

(Testimony of Hilton Jack Byars.)

each of the remaining counts left in the indictment.

(Argument)

Counts 4 and 5. Count 4 relates to the payment of a sum of $4,000, allegedly, and a purported claim for $4,000 to the United States when, as a matter of fact, there is a claim, not for $4,000, but a claim for $4,300, and the proof in connection with that particular item, as presented by the Government, the Government alleges in this particular account, or these particular accounts, that there was to be [269] that that was merely for flight tests; the Government exhibit, which was introduced in evidence, and which must be read most favorably to the party producing it, shows that that particular item was to be for flight test and insurance. That is the terms of the contract. In connection with that exhibit 49, the contract between the Government on a chief test pilot's fee and insurance, $4,000, and we submit that the Government's witness, Mr. McAvoy, testified that not only was all his insurance paid, all his expenses were paid, and the proof established that he got $200 more than was alleged in the indictment in the money itself. Therefore, the proof has failed as far as those two counts in the indictment are concerned.

The indictment, as your Honor knows, must be proved strictly as alleged, and here the proof is quite to the contrary of the indictment itself. The proof not only was that the item was not merely for flight test, but was for other items as well, and

(Testimony of Hilton Jack Byars.)

the proof as to the amounts of money received, and that other monies were paid, and that the amount of the claim was not $4,000 but was $4,300, and $4,300 was paid. That the Government's evidence further shows that the witness has testified there was no guilty knowledge on the part of Mr. Zap as to those transactions.

Motion for directed verdict on behalf of defendant Zap was made and denied and exception allowed on each count remaining. [270]

ETHEL H. BOYLE,

called as a witness by and on behalf of the defendant Edward F. Zap, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

I was bookkeeper at the Zap concern from September 8th until officially November 25th, 1942. There is an account in connection with the payment of certain items of fees for work done on contract 83142. Mr. Browne had me make out the account. I never at any time ever received any instructions from Mr. Zap on how to make out that account. I never did ever receive any instructions from Mr. Zap about how to make out any account. I did not ever see or hear Mr. Zap give me any instructions, to anyone in the office on how to make out an ac-

(Testimony of Ethel H. Boyle.)

count. I received my instructions from Mr. Browne in connection with the entering of the books and records in the firm.

Mr. Browne was the certified public accountant that I took my orders from him. Mr. Champlin was the comptroller and I took some orders from him, but those were the only two.

I don't recall ever seeing Mr. Zap look at any of the books and records. There was an item "Drawing Account," it was Mr. Zap's personal drawing account. I was there after Mr. Zap left for Washington. I saw what activity was going on in the office by Mr. Champlin and other employees. [271]

Any activities that went on in the private office, I was not there. I sat outside. Mr. Zap was arrested on November 5th, 1942.

Mr. Lavine: Now, state what Mr. Champlin did on that occasion, and on that date.

(Government objects, after argument.)

Mr. Lavine: What did Mr. Champlin do, particularly with reference to posting a sign or notice?

The Witness: Well, the first notice was to the effect that he was in charge. I don't know where that notice is now. I couldn't repeat its contents verbatim. It was something to the effect that he was in charge, but I really couldn't—I don't know—couldn't say.

Mr. Champlin called meetings. There were meetings all the time, but I—I really don't——

Mr. Lavine: What did you hear derogatory,

(Testimony of Ethel H. Boyle.)

particularly about any statements that you heard Mr. Champlin make against Mr. Zap? Just give us those statements.

Mr. Maury: No foundation laid, no time or place.

Mr. Lavine: What did you hear him say with reference to Mr. Zap? Against Mr. Zap?

The Court: Just be calm now. You are probably not used to this procedure.

The Witness: I am not.

The Court: Nothing to be afraid of, and just take your time to it. Don't hurry. Nothing to be nervous about. [272]

The Witness: Well, he would say that he was going to take——

Mr. Maury: Object to that.

The Witness: I really don't know.

The Court: You finish your sentence.

The Witness: He would say that he was going to take charge, and that Mr. Zap was going to be arrested. He told me that. (Witness became very nervous.) Goodness, I don't think I could repeat anything right now. My thoughts are just completely gone.

WALLACE HOWE McLAUCHLAN,

called as a witness by and on behalf of the defendant Edward F. Zap, having been first duly sworn, was examined and testified as follows:

(Testimony of Wallace Howe McLauchlan.)

Direct Examination

By Mr. Lavine:

I am employed at the Hughes Aircraft Company. I worked for Mr. E. F. Zap, Aeronautical Engineers from July '41 until about sometime in November, the 24th. I was aerodynamitist, and as aerodynamitist I made several trips to the University of Washington. I was accompanied by Mr. Zap, and also by some of the other men that were employed there on different occasions; didn't always have the same crew. I took different crews with me on different occasions. During 1942, I think we made three trips up there altogether. During those trips, [273] I had occasion to work in the wind tunnel at the University of Washington. I observed Mr. Zap working up there in the wind tunnel. He was always there when he was with us. He worked at night as well as daytime. We worked almost every night, and when we worked at night, we all had keys. We were given keys to the tunnel and to a private office which no one else could enter but ourselves on the day we were going into the tunnel. In other words, we signed the register and we were given those keys at that time.

When Mr. Zap was working in the evening, the number of students that he would have working with him varied greatly, on account of the difficulty of getting men. We sent word around amongst the boys in the classes that we would be glad to pay

(Testimony of Wallace Howe McLauchlan.)

them overtime for any time they could put in there between classes, or after classes, so they were coming and going and it is difficult to say just how many men were there, but sometimes we had quite a gang there, and sometimes there wouldn't be more than possibly eight or ten men, that might represent the regular crew, but it ran from eight to ten men, up to as high as—oh, I should say 15 or 20, or maybe on occasions even more, those that happened to come in. We would prepare for the work the next day. We were trying to hurry that job through so we could get the job through.

When we go into the tunnel we usually have a very definite purpose in mind: we are trying to find out the [274] answers to some particular problems, and we plan our progress in such a way as to get these results with the least amount of work and time, and the results of each day's work are very important in the planning of just what you shall do on the next day. In other words, you may find something out during the day's work which changes your plan entirely for the next day. So it is important to us to get the information from the day's work as quickly as possible. In the tunnel up there, normally, when you have a full crew, they would be able to give that to us. But due to the proximity of the Douglas plant—the Boeing plant up there—they took all the tunnel students just as soon as they were able to do this work, they would lead them off and pay them good money, so the

(Testimony of Wallace Howe McLauchlan.)

tunnel was really under-manned all the time, so we just had to do everything we could to get this work out.

Q. Yes. Did you have a name—call this work in the tunnel by any special name or title?

A. No. We just used and generally referred to it as—the tunnel charges are so segregated between the power charges, which are required to operate the tunnel, and your manpower charges, and I don't know as we had any particular designation for it outside of that.

Q. Did you call these students that you hire, did you call them "manpower"?

A. That would be the manpower part of it. Yes. Mr. [275] Zap paid these students privately. I saw him do that. These boys worked overtime for us, were always paid by Mr. Zap. He always carried the finances and they were all paid privately, usually in our little private room that we had for our own use there. He always paid them in cash.

We were asked to pay the boys personally, owing to the fact that Dr. Eastman objected to them working overtime on the grounds that it interfered with their grades, and also to the fact that they felt that when it was charged through the [275-a] tunnel they would not be paid the same rate that we were paying them.

The purpose in having these boys work overtime was to expedite the work in the tunnel. In other words, we were limited in the time that we could

(Testimony of Wallace Howe McLauchlan.)

get in the tunnel, so we wanted to get as much work done in that time as possible, and I believe it is generally conceded there in the tunnel we used to get about three times as much work out of the tunnel in our allotted time as any other of the manufacturers that came in there. Mr. Zap was always on the job and kept things going, and under pressure at all times.

Cross Examination

By Mr. Maury:

Mr. Zap knew he was paying these boys and he knew that Dr. Eastman objected to it.

Q. By Mr. Maury: Calling your attention to the contents of Exhibit S, stating the total cost of the test program, and outlining the charges that were made by the University of Washington, and the date done, now, can you tell us concerning Report No. 177, what work was done at the University of Washington wind tunnel?

The Witness: On report 177 the tunnel work involved the determination of dynamic characteristics, uses of lift, and drag, and moment coefficients.

Q. By Mr. Maury: What job was it on?

The Witness: That is 177. This 177 was called special [276] wing, which was designed to bring out certain pertinent information.

Q. By Mr. Maury: Was it called Project 15 at Mr. Zap's plant?

(Testimony of Wallace Howe McLaughlan.)

The Witness: 177 and 178 were called Project 15.

(Whereupon, at 12:00 o'clock noon a recess was taken until 2:00 o'clock p. m. of the same day.)

[277]

Los Angeles, California, Thursday, April 15, 1943.
2:00 P. M.

Wallace McLaughlan

resumed the stand as a witness on behalf of the defendant, having been previously duly sworn, and testified further as follows:

Direct Examination
(Continued)

By Mr. Lavine: You were asked about Project 15 just before the noon recess. Tell us what is project 15?

The Witness: Project 15 was the file number given to two guinea pig wings which we developed to bring out certain specific information which was necessary in the application of our flaps to the different designs that were contemplated. I don't know who gave the project that number or that designation. As to how that came about, I think probably some clerk or something put that number on there. I know when I finished the report it was bound up and when I received a bound copy it had "Project 15" on the outside, but I didn't pay much

(Testimony of Wallace Howe McLauchlan.)

attention to the filing system. I didn't know what the numbers meant.

Project 15 covered two wings which were designed with the specific purpose of securing some general design information which we needed and needed badly, to determine design loads for applying the Zap flap and aileron to the project that we were actually working on with the Navy. [278]

When I went to work for Mr. Zap the first thing that he started me on was preparation of a design manual which, I understand, the Navy had requested, for the use of manufacturers in general who wished to apply the Zap devices to their airplanes, and he told me that we had all the information that was necessary to proceed with this manual. When I got into it I found out that there were many, many points that we were very weak on and needed more general information, and so I started harping on plans to get this information, and every opportunity we'd try to get a little more information of a general nature.

So these two wings were designed with that specific purpose in mind, of finding the effect of the Zap flap on wings of different spans and different thicknesses, and they were purely and simply what we called guinea pigs.

Q. Now, Mr. McLauchlan, was this experimental data of value, in your opinion, to the United States Navy?

Mr. Maury: Objected to as calling for a conclusion of the witness.

(Testimony of Wallace Howe McLauchlan.)

Mr. Lavine: He is an expert. He is qualified as an expert.

(Question reframed) By Mr. Lavine: Mr. McLaughlan, are you familiar with the projects on which Mr. Zap was working under contract with the United States Navy? A. Yes, sir.

Q. Now, did this experimental work help beneficially [279] in those particular matters in which Mr. Zap was under contract with the United States Navy?

A. That was the purpose for which it was done. It was absolutely essential.

Q. By Mr. Maury: Now, you stated that report No. 177 and 178 related to this project 15. Was there other work done at the wind tunnel besides on these two reports? A. Yes, there was.

Mr. Maury: We will stipulate that there was.

Mr. Lavine: Well, I thought the effect of your question was that there wasn't. I will accept the stipulation.

Cross Examination

By Mr. Maury:

Q. Mr. McLaughlan, do you know of your own knowledge whether or not this project 15 was one of Mr. Zap's own experiments, as distinguished from his Navy contract?

A. The question is rather broad.

Mr. Lavine: Now, just a minute. I object to that as calling for an opinion and conclusion, because we expect to show that under the terms of

(Testimony of Wallace Howe McLauchlan.)

contract 83142 and 4105 and TD 5000, which is a provision of those contracts, that Mr. Zap had a right to conduct any and all experimental work, even in advance of contracts; that that was contained right in those contracts. So this is calling for a conclusion of the witness.

The Court: I will permit the question. [280]

Mr. Lavine: Exception.

The Witness: This work, the two wings, was done at my own instigation. I am talking about project 15—those two wings. That was done because the stress department lacked sufficient information to properly design the Government jobs which we were designing at that time, under contract. We needed further information. So these wings were designed to bring out certain information which we felt was essential to the completion of these contracts. In that sense I would say they were not a private venture.

We were working on the OS2U. I don't know the numbers of the contracts. That was the Vought-Sikorski. And the Grumman contract was especially the one that we needed this information, because the Vought job had progressed to the point where we couldn't do very much about it, but we felt that it was—we hdad done a lot of guessing on it as far as certain design loads and so forth were concerned, which we didn't want to have to do on the Grumman.

This work took place on project 15 that we did at the wind tunnel; it was on the trip up there in

(Testimony of Wallace Howe McLauchlan.)

the latter part of February, 1942. I think that contract, that tunnel date was for about seven or eight days. We tested the 177 and 178. Those were the two guinea pig wings. We also had the Grumman model along with us. We put that in the tunnel and checked that to get certain calibrating checks which were necessary to tie this work with the Grumman job. Separate reports were [281] made for the Grumman job. I remember testifying before the Grand Jury.

Q. Do you remember Mr. Harrington asking you concerning Project 15? Was that one of——

Mr. Lavine: I object to that as an improper method of impeachment of the witness.

Mr. Maury: Not for impeachment purposes. This is to refresh his memory, your Honor. I am asking him if he remembers.

Mr. Lavine: I submit it is not proper foundation.

The Court: Show it to him then. He has a right to see it.

Mr. Lavine: I have a right to see it.

Mr. Maury: No, sir. Neither has a right to see it in the Federal Court. This is a Grand Jury transcript, your Honor.

Mr. Lavine: He has got to show it to him, to the witness, and he has got to show it to me, your Honor. If there is any question about that—I think your Honor is quite familiar with the rule.

(Testimony of Wallace Howe McLauchlan.)

Mr. Maury: I think that question was decided both in the General Motors case and the Socony Vacuum case, your Honor, that it was not necessary in such procedure.

The Court: You say it is not for the purpose of impeachment?

Mr. Maury: No, sir, for the purpose of refreshing the [282] *the* witness' memory.

Mr. Lavine: There is only one rule for refreshing a witness' recollection, your Honor. It has got to be shown to the witness.

Mr. Maury: Not in Federal courts, sir.

Mr. Lavine: In any court.

Mr. Maury: Not when it is a Grand Jury transcript.

Mr. Lavine: I will submit it.

Counsel certainly has a right to ask him. Suppose in the next sentence he amplified and clarified it. Am I limited to the one sentence that he is asking this man about?

The Court: No, but if the witness' attention is once called to a certain incident, why, then he can certainly go ahead right there and from there on explain anything he wants to about it.

Mr. Lavine: First of all, your Honor, the rule is that in order to refresh a witness' recollection the document must be shown, and he must be asked if that refreshes his recollection. If he answers no, that it doesn't, that is the end of the proceeding. If the answer is yes, it does, then he can proceed.

(Testimony of Wallace Howe McLauchlan.)

The Court: I will overrule the objection. Proceed.

Mr. Lavine: Exception noted.

Q. By Mr. Maury: Mr. McLauchlan, do you remember——

Mr. Lavine: Pardon me just a minute. May I at this time request the Court for permission to see the document [283] which is now attempted to be used to refresh the recollection of this witness?

The Court: It is not offered for impeachment and, therefore, it will be denied.

Mr. Lavine: Exception noted.

The Witness (Continues): I remember testifying before the Grand Jury. I don't remember Mr. Harrington asking the particular question, what was project 15.

Q. Do you remember answering him in the following words: It was a——

Mr. Lavine: Now, to all this we object, your Honor, as an improper method of refreshing his recollection, and we submit that it has not been shown to counsel and that it is not proper form of procedure.

The Court: Overruled. Proceed.

Mr. Lavine: Exception.

Q. By Mr. Maury: Do you remember answering in the following words: "It was a cargo carrying ship which we were working on at that time"?

A. I don't remember the exact phraseology. I might have said that.

(Testimony of Wallace Howe McLauchlan.)

Q. Do you remember Mr. Harrington asking you: "Was that one of Zap's own experiments, as distinguished from his Navy contracts?".

Mr. Lavine: Just a minute. Same objection, your Honor.

The Court: Same ruling. [284]

Mr. Lavine: Exception.

The Witness: That was one of the questions, you say?

Q. By Mr. Maury: That is what I am asking you, whether you remember it.

A. I remember it was discussed. I don't remember the exact phraseology that was used.

Q. Do you remember answering that question in the following words: "As I understood it was"?

Mr. Lavine: I object to that as irrelevant, incompetent and immaterial, what his understanding was. He didn't say he knew. And I object to it as an improper form of refreshing his recollection.

The Court: Overruled.

Mr. Lavine: Exception.

Mr. Maury: Will you answer the question, please?

The Witness: I don't remember answering the question in those words, although it might have been.

Mr. Maury: That is all. One thing further, please.

Mr. Lavine: Now, the defense counsel——

Mr. Maury: One moment, please.

(Testimony of Wallace Howe McLauchlan.)

Mr. Lavine: Yes.

The Witness: I remember compiling a sort of a report concerning this project 15. There was a small booklet made of it. It did not have a good deal of this data from the wind tunnel in it. It did not have any data which was based on that. This booklet was compiled before those tests were [285] made.

The Court: The testimony is in. I have permitted it to stand, counsel. He said the book was made prior to the tests, and I permitted it to stand.

Q. By Mr. Maury: What was the book?

A. The book was a proposal showing an estimated performance of a cargo carrying plane which we hoped to design around the Zap high-lift devices. The book was submitted to the Navy and to the Army, by Mr. Zap, for the purpose of calling their attention to the possibilities of such a type of plane which we felt was very greatly needed at that time.

There's no particular limit to the size the plane might be. The particular one we had in mind was, I think, something like 100,000 pounds. Well, the wing spread—you could vary it. We had shown a wing spread of 150 feet, I believe, on that particular model. I couldn't say what was the length. That is not a dimension that we're especially concerned with in our design. The length of the plane is not a major dimension. If you speak of the size of a building you might give its width and height.

(Testimony of Wallace Howe McLauchlan.)

and length, but you wouldn't say how high this door was or that door was, if you are just speaking of the building in general terms. I have stated that I do not know the length of the plane. The wing span was 150 feet. I couldn't tell you what would be the height of the plane. I do not know what the wing spread of a Vought-Sikorski was. I did very little work on the [286] Vought-Sikorski. I did quite a bit on Grumman NX 4105 at different periods along through my employment there. The Vought-Sikorski is not a cargo plane. It is a scout observation. The Grumman was a fighter.

GEORGE JUE,

called as a witness by and on behalf of the defendant Zap, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

I am employed at the Howard Hughes Aircraft Company. I am a graduate of the Massachusetts Institute of Technology. I used to work for Edward F. Zap in June, 1941. I was employed there for about 18 months. I went to the University of Washington, making wind tunnel tests there. I went up twice in 1942. During the time that I went up there, I did see Mr. Zap there. At that time I conducted wind tunnel tests in the University of

(Testimony of George Jue.)

Washington—we did. I was working on the wind tunnel in the daytime and also in the night.

I worked every night. Usually we quit at 11:00 or 12:00, but sometimes we worked on until 1:00 or 2:00 in the morning. During that time, Mr. Zap had students of the University of Washington working with him. It varied at different times, from 15 to 30, I would say. I saw how those students were paid. Mr. Zap paid them from his pocket, in cash. I didn't [287] see any receipts given by the students. I am familiar with the rules of the University as to these students working at night. I think they were not allowed by the University to work at night. When we worked that way at night, we would be all prepared for the next day's work in the wind tunnel.

In connection with that work, I am familiar with the terms and titles that are used in our business. We have a language of our own, so to speak, about some of the things we do. We call the working in the wind tunnel as to the different men who were employed there, we call it "manpower".

We had keys of our own to the wind tunnel. We had access to running the tunnel at night. We got special permission to run it late in the evening. Mr. Zap worked longer than most of all the fellows and he usually stayed through to see that everything was brought together right, in the night.

(Testimony of George Jue.)

Redirect Examination

By Mr. Lavine:

Q. You didn't give your degree in the University.

It is stipulated that he has a Master's degree from the Massachusetts Institute of Technology.

(Witness excused) [288]

DAVID KEHSIN WANG,

called as a witness by and on behalf of the defendant Zap, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

I am a graduate of Massachusetts Institute of Technology. I went to work for Mr. Zap January 7, 1942. I am now working at Howard Hughes Aircraft Company. I worked for Mr. Zap for approximately 10 or 11 months, until it closed up. I stayed on after that time. I remember going to the University of Washington on some wind tunnel tests. I think the tunnel date was February 24th, until about March 4th. We went a couple of days before that. I met Mr. Zap up there. We worked late into the evenings. We had keys there to go in and come out. Mr. Zap was employing a number of students there—I would say about altogether 25 or so. He paid them—he just gave the money to them; in

(Testimony of David Kehsin Wang.)

cash, that. is. That work enabled him to be prepared for the next day's runs. We usually tried to get things, the model fixed up so we could start first thing in the morning again before we'd leave. We did use the tunnel balances. I remember specifically. I don't recall about whether the tunnel was run. Usually, I went home around, oh, 10:00 or 11:00, and I know Mr. Zap stayed later than that.

[289]

ETHEL H. BOYLE,

called as a witness by and on behalf of the defendant Zap, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Lavine:

Q. Miss Boyle, I hope you don't get too nervous now. A. I will try not to.

Mr. Byars called me up on the telephone during the month of September or October of 1942 and dictated it to me over the telephone. He called me in reference to making out an invoice. He dictated the form of the invoice and how much I—the figure.

Q. One other thing, Miss Doyle. This morning I asked you some matters with reference to Mr. Champlin. I will ask you if Mr. Champlin told you after Mr. Zap left that he was going to send him to prison for 167 years, or words to that effect?

The Witness: He did.

(Testimony of Ethel H. Boyle.)

Q. And did he tell you on that occasion that he was going to be in charge of Zap's concern and that you were going to have to take orders from him?

The Witness: He did.

Cross Examination

By Mr. Maury:

Mr. Browne and Mr. Champlin gave me my orders there. [290] As for receiving orders from anyone else, it's just the thing that Mr. Lavine asked me; Mr. Byars called me and I did take an invoice, two invoices, I believe, over the telephone. I never gave a check to Mr. Zap directly. I used to give my checks to Mr. Browne and he took them in to Mr. Zap. I gave Mr. Zap a check in blank through Mr. Browne, yes. I never had any dealings with Mr. Zap directly.

I remember a conversation I had with you over the telephone about a week ago last Saturday, and I told you at that time I was very hazy and I was going to try and think about it, and I called Mr. Browne and asked him, so I would be sure and give the right testimony when I came to court, because I didn't want to do anything wrong. Surely, I checked it up then.

Q. By Mr. Maury: At that time it was your recollection, was it not, that the only blank check you had ever given Mr. Zap was the one that was later returned and filled in for $4,000, isn't that right?

A. Yes, I took notes as you were also taking notes of my conversation. And I called Mr. Browne

(Testimony of Ethel H. Boyle.)

on Sunday and asked him to be sure that I would have the right information because I told you I was rather hazy about it, and I took my notes, too.

Q. Then it was Mr. Browne who gave you the directions or orders to fill in that check for $4,000?

A. Yes, it was. [291]

Q. By Mr. Maury: Calling your attention to Government's Exhibit 7, in evidence, this is the check, is it not, Miss Boyle? A. Yes, it is.

Q. And when it left your possession it was in blank?

A. It was given to Mr. Browne. All checks were placed in Mr. Browne's desk, and he took them in to Mr. Zap.

Q. I see. When it came back what happened?

A. Mr. Browne was given it again, and then it was given to me and I deposited it in the bank.

Q. I see. Do you remember whether it had that endorsement on it at the time you saw it the second time when it came back?

A. It had Mr. McAvoy's endorsement, and it had Mr. Zap's signature.

Redirect Examination

By Mr. Lavine:

Q. As I understand your former testimony the amount was still blank when it came back to you?

A. When it came back to me to be filled out, yes, sir.

Q. And you took directions how to fill that out from Mr. Browne? A. From Mr. Browne.

(Witness excused) [292]

EDWARD F. ZAP.

called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

I have been an aeronautical engineer between 28—close to 30 years. I started off with Chrysler, as I recall it, in 1923. Before that I was more or less independent. With Chrysler I was more or less chief of research, in the automotive branch, and later on we started aviation—that was around the *Lindburgh* boom, when *Lindburgh* flew the Atlantic. I continued in that research work—roughly—of course, I can't say the date correctly, but somewhere around 1933—1932 or '33.

During the time that I was working with Chrysler, I commenced work for the United States Navy. One of the duties of mine was to check up on the Fokker Aireraft, in Hasbrouch Heights, for Chrysler. It was contemplated, or Mr. Fokker made the offer to Chrysler to take that corporation over and make it a Chrysler division, so I was sent to Hasbrouch Heights to investigate the situation and make a report and see what can be done. I later became consulting engineer in aviation for other companies.

That Fokker situation broke up at Chrysler, and it was taken over by General Motors, and I joined the Fokker Corporation for a short period. I can't recollect. I think it [293] was somewhere around

(Testimony of Edward F. Zap.)

1925. That Fokker Corporation was the beginning of General Aviation, which now is North American Aviation. And Mr. Kindelberger was then and there the head of the corporation back in the east.

I was consulting engineer almost to any major aircraft company in the *company*. There is Boeing. Boeing is using my flap on their Flying Fortress. I conducted a lot of wind tunnel tests for them, down at N.A.C.A.; that is the National Advisory Committee for Aeronautics. The Martin Company, Lockheed, Vultee, Douglas Aircraft, Douglas Aircraft Division, El Segundo, Fairchild, Welt, there probably are four or five little companies I did some consulting work for and got paid for, and probably there are a flock of corporations which went under in the meantime.

The old Zap flap which is known all over the world as the split flap, I originated that flap. That was done somewhere around 1928 or '29. We did a lot of wind tunnel testing before that. Then we finally built an airplane to discover or to get the proof of the pudding in flying an airplane, and I traveled all over the country and demonstrated that flap for Army and Navy officials, and at that time I was turned down. I was literally thrown out on my ear at the Army with it, and just about two years later it was generally adopted on every airplane, and this was probably in the period from 1928 until 1934, it was used on almost every airplane in the world, and is still used. Of course, there are other [294] flaps used now, too.

(Testimony of Edward F. Zap.)

The new flap is more or less a further advance from the old flap. The old flap is more or less a landing flap, as we call it in our profession, whereas the new flap is for the sole purpose to help the take-off. The new flap changes the airfoil section from a high speed section to a good climb section, and that is the main purpose of that flap. It works on a very simple basic aerodynamic principle; that is, on the two basic laws of aerodynamic area extension and camber increase. I don't want to go in too much of technical things, but I can explain it very simply in common words. I usually explain it to students by taking a spoon, a common kitchen spoon, and going to the faucet in a kitchen, turning on the faucet full stream. If you take the spoon into the stream the spoon is sucked in; if you reverse the spoon and try to push it into the stream, the stream pushed the spoon out. That is the simplest explanation why an airplane flies. You can try that tonight at home.

In the first place we were after to increase the takeoff; that means area extension plus camber increase. Then we found, of course, we needed also some help in the landing. It was a simple matter to roll that flap steeper out on a particular radius.

I could explain this thing, your Honor, if I could use the blackboard.

(Going to blackboard) [295]

This is a common wing section (indicating). Now the new flap is nothing else but an extension of the

(Testimony of Edward F. Zap.)

upper surface. It rolls out in a curve on a radius. The purpose is to extend area, at the same time to increase the camber. What this thing does, aerodynamically speaking, as I tried to explain with the spoon—I will sketch this up. We have a kind of a stream coming out of the faucet here. You put that spoon in this way and you will find it is sucked into that stream very vigorously. If you put that spoon in reverse it is blown out. That is the proof why an airplane flies. You just have to turn that stream to 90 degrees. The air passes over the wing, sucks that wing into the stream. It does not make any difference if the stream is standing still and the foil is moving, or the foil is standing still and the stream goes.

You can light a match by striking a pad, or you can hold a match still and move the pad over it. It is the same effect. This is the same effect; in the wind tunnel we keep the model, the airplane still, but move the stream. In actual flying conditions the airplane moves and the stream is standing still.

Now, to make the story short, extending these things out with the flap—I will sketch it up plainly here—there is a pressure differential created going through the air which is, in our language, expressed by a curve. This is more or less a partial vacuum curve which supports the airfoil, and [296] there is a slight little pressure thing created which also supports the airplane. Both areas represent the weight of the airplane.

Now, naturally, if I extend that area out here,

(Testimony of Edward F. Zap.)

automatically this curve is extended. At the same time from the bottom side we obtain a little pressure curve extension. These two area gains is to gain in lift. So by simply taking an airfoil section and rolling that new flap out, I am able to double the lift on that wing section, and this is done by extending only 20 per cent of the original surface. In other words, the gadget on the tail stimulates the front part of the wing to such an extent that it creates twice as much lift. And that lift can be utilized now in many ways; either carrying double the load, or, with the same load, the takeoff is in a shorter distance. This is just plain logic. If you have a wing going through the air with the same weight and the wing creates twice as much lift, naturally it takes off in a shorter distance; or you load that airplane up twice as much and then it runs over the same distance and takes twice as much load off.

The same thing applies when the airplane goes up in the air. We call it the ceiling, which is the top, the air gets rarefied, the airplane can't make it any more; if we roll that device out, naturally the airplane can climb to a higher altitude.

Probably that is enough. [297]

When I took up this work with the Navy on this new flap, I believe it was somewhere around 1934 or '35. Without looking the records up I couldn't say. Of course, I had been known in the Bureau years ahead of that time. I worked for the Bureau right from the beginning, when I was connected

(Testimony of Edward F. Zap.)

with the Fokker Corporation, General Aviation. That was back in 1927, '28. I demonstrated an airplane. I flew down to Anacosta in those days for the first time in the world with a flap on an airplane. I conducted wind tunnel tests then for the United States Navy, and in the Navy testing grounds at Anacosta.

I flew that airplane down to Anacosta and demonstrated the airplane down there, and Navy pilots took it up then afterwards, and the Navy decided to send this airplane down to the N.A.C.A., which is the National Advisory Committee for Aeronautics, the leading research laboratory in the world, and that airplane was put in the full scale tunnel to get coefficients and engineering data for general use for design purposes to the various contractors, and there is a report and this is existing in the libraries; you will find them in our libraries all over the world, the N.A.C.A. report about the first split flap, and the research.

I started to take up my flap about 1935 or '36 in the Bureau of Aeronautics in Washington. There was a depression on in those years, and I went to the Bureau—no. I think I got a letter from the Bureau to come down and look at some [298] reports, or some kind of a problem. I could dig up the informatin in my files. I was invited to come down to the Bureau, and the purpose I have forgotten right now. Out of that visit there came—of course, I knew all the commanders and captains in the Bureau, and they asked me what I have done in addi-

(Testimony of Edward F. Zap.)

tion to that flap, or if it could be improved. Well, it is a long story. To make it short, the question of the Bureau was this. The equipment of Naval aircraft is getting heavier and heavier; the wind loading, which is another technical term I want to dispose of quickly. As we call it, wing loading means the loading a square foot of wing. The higher the loading is, the more cumbersome the airplane gets so far as takeoff and maneuverability is concerned. In simple terms, if you take your own car and load six people in there and drive around a curve, you know what it does; it leans over and is hard to handle. If you have two persons in there you slip around the corner much easier. The same thing is the wing loading.

The Naval equipment got heavier and heavier. Wing loading used to be originally on airplanes starting off at six pounds per square foot. Today we are up to 40, 50 and 60 pounds wing loading. At that time the wing loading was creeping up to 15 or 20 pounds, and the Navy had extreme difficulties of catapulting the airplanes from the cruisers, and takeoff on restricted places.

So the chief discussion was how to help an airplane [299] takeoff, shorten the takeoff distance. And I explained that naturally there must be some means, and I spent a lot of thought to improve that old flap of mine for takeoff, and the outcome, to make the story short, was that they invited me to do some more research or make suggestions on how

(Testimony of Edward F. Zap.)

such a thing could be done. I don't recollect all the details or how it happened. I know this. The Navy gave me two wind tunnels in Washington, D. C., the Navy tunnels, at my disposal to start that research. I don't know in detail. I guess I had to make the models and run engineering on them, and they gave me the equipment to test this thing. There are two thick reports in my file, and the Navy file, confidential file. To make the story short again, I think I did that about two years.

After that time, I got a contract with the Navy for the doing of experimental work. In the wind tunnel we proved the claims we made for that flap. Then it reached the stage where the Bureau said, "Yes, this is correct; it can be done." Now, in Navy terms they said, "We want to build it in an airplane and sit on it and see if the other end feels the same way with it." Then I got an experimental contract to put that particular new flap on an airplane and fly with it. That was somewhere around—without looking at the records I can't say. 1937, '38, somewhere around that time.

That is the Bureau of Aeronautics, which is a branch of the service in the Navy which takes care of aircraft [300] and aircraft equipment to the Navy, and it consists of a stress department, aerodynamic department, engineering department, purchasing department, and—oh, gosh. Now—my best sponsor there used to be Admiral Moffett. I forgot to tell. You see, Admiral Moffett died on a dirigible

(Testimony of Edward F. Zap.)

in a crash. He used to be chief of the Bureau of Aeronautics.

After that I took up these matters with the Aeronautics section. The section head is Captain Walter S. Diehl. Then the Engineering section. There are several captains and commanders. You see, they are changing every two or three years, another naval officer comes in and takes charge and the particular naval officer goes back out to the fleet or to some other branch of the service. In the Engineering section is Captain Penoy, Captain Stevens, Captain Ostrander. There used to be Captain Pace. He is Admiral Pace now.

Then the project officers on the job are Commander Flemming, Commander Pearson. Those are called project officers, which are in charge of the various types of airplanes. You see a fighting airplane is called an F4 or F45; it is a fighter. OS-2-U means observation scout. SO means scout observation. B means Bomber, and so on down the line. And for such different type of airplane there is a so-called project officer who knows all the details, the specifications, and what is necessary in that airplane, what the Navy wants, and so on down the line of a thousand technical details of making an airplane. [301]

All my contracts except the last two were fixed price contracts. In other words, I agreed to do the work for a certain amount and was to get paid a certain amount. That is correct. The last two were

(Testimony of Edward F. Zap.)

mixed contracts, as we call it; cost plus a fixed fee, and fixed price for certain items. Mostly the engineering items were fixed and the physical parts, building the airplane, were cost plus. I had a total of approximately seven or eight. I got a new contract as late as September, 1942. A little work had been done on that contract. Usually in the last year or two years we started ahead of time. Particularly since Pearl Harbor everything was in a hurry. Go to it and you get reimbursed after the contract is signed.

I entered the contracts and there were several in number and, as brought out more specifically in the contract itself, each was a continuation of the other, more or less. I did some work on some of those contracts in advance of getting any actual contract from the Government in writing. We always got it earlier. I usually made a periodic trip to Washington. It is all in the records, in the files. It was about three to four times a year I went to Washington; every three months. I usually made a round in all the offices in the Bureau, visited whoever was there and I could get hold of and I thought it was important to talk to, and straighten matters out which we couldn't straighten out by letters.

I know Mr. H. E. Talbott. I was connected with him in [302] the Chrysler corporation. He is a director of Chrysler. I think he was at one time chairman of the Board of the Chrysler Corpora-

(Testimony of Edward F. Zap.)

tion. Later he became the director of aircraft production under Donald Nelson. He is his right-hand man for aircraft production.

We had two bosses; one is the Navy, the other is Talbot, you see. He was director of Aircraft Production. If there were any civil matters to take up, we had to take it up with Mr. Talbot.

Mr. Talbot was out here and looked matters over, and he induced me to build a plant, and he wants to go in it, and he wants to run the financial end of it, and I should concentrate only on the engineering end, and on the research end.

I met Lieutenant Commander Scott at Northrop Aircraft. At that time he was a civilian. I don't know correctly what his status was with the Navy. He was just an inspector, a Naval inspector which walked in my office and checked an airplane or material. To my recollection he didn't have any title whatsoever, just "Naval Inspector", and he had the standard Navy button, like any other inspector.

Mr. Talbot's idea was at that time to go in financing the plant, starting in somewhere around $500,000, and build the thing up to $5,000,000.

What stopped the plan from being carried out was more or less, well, the war condition throughout the world. [303] We were put in an emergency thing. And that was just about a year or a few months before Pearl Harbor, and, well, without thinking it over I don't know the real reason. The real reason, as it appears to me, was Mr. Talbott

(Testimony of Edward F. Zap.)

didn't know what's going to happen. And we carried on the negotiations for about a half an hour, and the question was to have a production manager to take care of building the airplane, standing up for the shop, and so forth. And Mr. Scott was around and at that time I knew him. After several months negotiations with Mr. Talbott I knew him a little more, and I got a good recommendation from the Bureau, who he is and where he came from and how long he was in the Navy, and he appeared to me like a good production that really knows shop procedures and carrying on, and handling men, which I did not know. So Mr. Talbott looked him over, or one of his righthand men, and said, "That is the kind of man you need in the shop to carry on, Zap. You are just a research engineer and you are not the man to handle 500 or a thousand men. You need a two-fisted man to go after it."

I took the matter up with the Bureau as to whether they would release Commander Scott, because the next thought in my mind was, well, here is a Navy inspector who actually had nothing to do with me, just inspecting the material or airplanes, but just the same, my good relationship with the Bureau—I didn't want to do anything without approval of the Bureau. [304]

Mr. Lavine: I would like to show that there is a provision in this contract that I think counsel will stipulate to, that there is a provision referred to as "PD-5000."

(Testimony of Edward F. Zap.)

The Court: That is right.

Mr. Lavine: And I would like to read a provision of that "TD-5000," so the jury will understand it, as it relates to experimental work. I am sorry, my copy and Mr. Balter's copy of the same work, got mixed up, and I had mine marked. I would like to read "TD-5000, Section D."

Mr. Maury: What work is that, Mr. Lavine?

Mr. Lavine: "Government contract procedure and accounting."

Mr. Maury: Who is it published by?

Mr. Lavine: Prentice-Hall, Inc.

Mr. Maury: I have no objection to its being read from that book. That is an accredited authority.

Mr. Lavine: (Reading):

"Other manufacturing cost. Other manufacturing cost as used in paragraph (b) of this section includes items of manufacturing costs which are not properly or satisfactorily chargeable to factory costs (see paragraph (c) of this section), but which upon a complete showing of all pertinent facts are properly to be included as a cost of performing the contract or sub-contract as, for instance, payments of royalties and amortization of the cost of designs purchased and [305] patent rights over their useful life; and 'deferred' or 'unliquidated' experimental and development charges. For example, in case experimental and development costs have been properly deferred or capital-

(Testimony of Edward F. Zap.)

ized and/or amortized in accordance with a reasonably consistent plan, a proper portion of the current charge, determined by a ratable allocation which is reasonable in consideration of the pertinent facts, may be treated as a cost of performing the contract or sub-contract. In the case of general experimental and development expenses which may be charged off currently, a reasonable portion thereof may be allocated to the cost of performing the contract or sub-contract. If a special experimental or development project is carried on in pursuance of a contract, or in anticipation of a contract which is later entered into, and the expense is not treated as a part of general experimental and development expenses or is not otherwise allowed as a cost of performing the contract, there clearly appearing no reasonable prospect of an additional contract for the type of article involved, the entire cost of such project may be allowed as a part of the cost of performing the contract."

The Witness: I came up to 1942 and '43, and in the meantime, I had engaged in considerable correspondence with the Bureau of Aeronautics at times, from time to time, and some of that correspondence went into forms of contracts, [306] or additions to contracts I had.

Q. By Mr. Lavine: Prior to your opening your own plant did you carry out some of the terms of

(Testimony of Edward F. Zap.)

the projects in connection with contracts 83142 and 4105 through sub-contractors and other persons?

The Witness: Yes, the sub-contractors.

The Court: March 22, 1941, was the date that contract was entered into, 83142.

Q. By Mr. Lavine: In reference to that contract did you do some of the work at some of the other airplane factories, referring specifically now, did you do any work at Northrop?

The Witness: I did.

I am acquainted with Captain L. C. Stevens, who was then Commander Stevens. I got a letter in connection with my contracts from Captain Stevens.

The Clerk: Defendant's Exhibit KK.

(The document referred to was received in evidence and marked DEFENDANT'S EXHIBIT KK.)

Mr. Lavine: (Reading)

"Navy Department
Bureau of Aeronautics
Washington

February 11, 1942.

My Dear Zap: [307]

"Receipt of your letter of February 7, 1942, is acknowledged. You know, I have long believed that it is necessary that whatever setup you work out be based on the undertaking of production work, either directly or as sub-contracting, in order that you may be in a strong enough economic position to continue to engage

(Testimony of Edward F. Zap.)

in experimental work. I am very pleased to note from your letter that you seem to have reached the same conclusion.

"I wish you every success in your proposed arrangements, and I am calling the attention of our Procurement branch and Production Division to your letter. I should think that sub-contracting would be your best solution for the immediate future.

With kind regards, I remain very truly yours,

L. C. STEVENS,
Commander, USN.

Mr. E. F. Zap, 10976 Wilshire Boulevard, Westwood Village, Los Angeles, California."

The Witness: Prior to that time I had some discussion with the Navy Department in connection with tying up with the Ryan Aeronautical Corporation, for the purpose of carrying out the terms of these contracts.

The Clerk: Defendant's Exhibit LL.

(The document referred to was received in evidence and marked Defendant's Exhibit LL.)

[308]

The Witness: After I had had various difficulties in getting going with those sub-contractors, I then started a plant of my own. I am talking about one of my own now, under which these contracts were started at 1005 Broxton. The Navy Department gave me financial support to start my own factory.

(The witness then described his offices)

(Testimony of Edward F. Zap.)

We had two safes, one safe was in here; this safe was used for all of the technical, confidential papers from the Navy; and then we had another safe in here which was used for all of the books and financial matters. The second floor was identical as the ground floor, except with this addition to it. In other words, the second floor was right on top of the same——

I got a third contract from the Navy while these two were in progress. Contract 41909. It was practically $66,000, somewhere around there. That contract was entered into about September, 1942.

I received instructions from the Navy, someone in the Navy, on or about the 3rd of November, to put our flaps on some planes at Douglas Aircraft. I received the letter and I discussed the matter when I was back in Washington, we discussed it very clearly with the Bureau: that was November 3, 1942.

I was arrested on the 5th of November. I remember going to the University of Washington wind tunnel. I was up there [309] so many times—on so many days.

Referring to these two contracts, 83142 and 4195, as I recollect, we had wind tunnel items there and we started on this right in the early part, ahead of signing of the contract. It must be in January or February, '41. I went up to Washington and decided it was a complete model for the boys to use OS-2-U, which we tested up there.

(Testimony of Edward F. Zap.)

In connection with our work at the University of Washington wind tunnel, I hired a number of students up there in off hours. I paid those students out of my pocket, petty cash.

The purpose is manyfold: in the first place, there was a scarcity of wind tunnels throughout the country, after Pearl Harbor particularly and allocation of tunnel time we had to make allocations months ahead of time to get the use of the tunnel and they had a drawing up there to allocate to the various companies, Boeing and Douglas, and others, and I was allocated a small amount of time; I could only use around five days or six days; in other words, one week, and then I had to delay and come back next month, was the reason why we tried to cram in one month as much test as we could so first, for our own purposes to get this data as quickly as possible; second, we didn't want to go back a month later; third, the reports coming from the University were always two or three months late and, of course, the war was going on, the Bureau pressed for the results, so [310] it was evident that we had to try as fast as possible to get our data on the tunnel.

During the year 1942, and particularly around June of 1942, in my office I had directly about 45 to 50, or 52 people; indirectly, some contracting, hard to say—between 50 and 250 people.

We did the engineering and the scientific work and the research. I attended to the tunnel, the engineering designing. I had a bookkeeper at all times.

(Testimony of Edward F. Zap.)

Harry Champlin started off and towards the end of it number one bookkeeper and then number two was Miss Ethel Boyle. I also had a certified public accountant. That certified public accountant was Mr. Cedric Browne.

After Pearl Harbor, you see, the situation changed completely around. Harry Champlin was the administrator of all the finances and all, attending to finances, getting the money in, getting the bills out, collecting, and so on.

If one of my employees came in and handed me a bill at my desk, I took a glance at it, what it refers to, and if it appeared to be reasonable or correct, I signed it.

I relied very much on the Navy cost accountant Miss Ethel Boyle, a certified accountant, Cedric Browne.

The Court: Anybody else? Anybody else that had anything to do with the books and records, making out the bills, that you remember? [311]

The Witness: Well, some of the girls might have helped in typing bills.

The Court: But those were the main ones?

The Witness: They were the main ones.

In connection with that work, I spent some money out of my pocket; I paid the students out of my pocket; it was in cash. On these wind tunnel tests I usually lost money, because in the beginning I forgot to take the money out; I put all out of my private things and forgot to collect it. That was in the period of 1941.

(Testimony of Edward F. Zap.)

In 1942 I think I collected more than $500 for that work; I can't tell you specifically, four or five hundred dollars; there were so many five-hundred dollars.

Referring to an invoice of $500 in Government's Exhibit 30 in evidence, signed June 29, 1942, the invoice is not correct when it states for electric power. The cost—it was thrown around like a red herring, the cost of electricity is very low.

The Court: How much is that invoice?

Mr. Lavine: $500.

Q. By Mr. Lavine: Now, in connection with the $500 item who, if you know, made out that particular invoice? Who made out that invoice for $500?

A. Referring to these what I have seen?

Q. Yes, the one I showed you. [311-a]

A. It was made out under Harry Champlin's direction. He mailed—made it out—I don't know—I don't know—I was too busy.

The Court: Now, that may go out.

Q. By Mr. Lavine: When that was handed to you, did you—do you recall now what you did in connection with it, particularly whether you read it, or didn't read it, or what you did?

A. Of course this is—

The Court: No, no.

Mr. Lavine: You can answer that.

The Witness: I probably took a glance at it, wind-tunnel, $500, and signed it. I know I was in the wind tunnel many times.

(Testimony of Edward F. Zap.)

The Court: That may go out. Wait a minute. That may go out. Your observation is that you glanced at it and signed it.

The Witness: That is correct.

The Court: All right. Proceed.

Q. By Mr. Lavine: Now, did you actually perform for and in behalf of the United States Navy $500 worth of work in the wind tunnel for which you had received no reimbursement at the time you presented that invoice?

Mr. Maury: Objected to as calling for a conclusion.

The Court: This is proper direct examination, counsel. You will be able to go into that matter more fully, but he is just examining him now, just the same as if a man had a con- [311-b] tract to go from here to San Francisco and back, under orders of the Navy, and you were to say to him, "Did you go up there and back?" And he would have a right to say, "Yes, I went up and back." In other words, establishing the services. I think that is proper. Proceed.

The Witness: Repeat the question.

Mr. Lavine: Read it to him.

(Question read.)

The Witness: Yes, I did, and more.

The Court: Now, just a minute. You have answered it.

Mr. Lavine: All right.

Q. By Mr. Lavine: And was that claim for the

(Testimony of Edward F. Zap.)

actual amount of money that you received correct and just?

A. To the best of my recollection, yes.

Q. And had you received for that work any payment at any other time?

A. Not that I recollect.

Q. Now, Mr. Zap—— A. May I explain?

The Court: No, no. You have explained it. You said you didn't.

Q. By Mr. Lavine: Now, Mr. Zap, there has been—Mr. Zap, were there any charges that you made in connection with the work at the wind tunnel where you didn't perform the services in accordance with your understanding of the [311-c] terms of the contract? A. Do I have the question?

Mr. Lavine: Read the question to him.

(Question read.)

Mr. Lavine: Let me reframe that.

Q. By Mr. Lavine: Did you collect any money from the United States Navy for any work that you did not perform? A. No.

Mr. Maury: Objected to as——

The Witness: Not to the best of my knowledge.

The Court: Let the Government put in the objection.

Mr. Maury: Objected to as calling for the conclusion of the witness, and asking the witness to decide the point at issue.

The Court: It is a matter for the jury finally, and then on the cross examination, counsel, you can

(Testimony of Edward F. Zap.)

take the matter up. I will allow it. The jury are not bound by the statements of any witness on the stand, whether they are Government witnesses, or whether they are witnesses for the defendant, the jury are to determine the case from all the evidence and what the facts are. I am sure that is agreed to by everybody. So I will permit the question to be answered. It has been answered. Proceed.

Q. By Mr. Lavine: Did you at any time intend to falsify any account submitted to the United States Navy? [311-d]

A. No, at no time.

Q. Did you willfully, falsely, fraudulently, or any other way, present any bill to the Navy and the United States which you believe to be unjust and to which you did not believe you were entitled?

A. I never would do a thing like that.

The Court: No, now. No.

Q. By Mr. Lavine: Your answer is no?

The Court: Strike out everything except the word "no". All right. All right.

Q. Now, Mr. Zap, there has been considerable discussion here about project 15, and that relates to the first—the matter is charged here—what is project 15?

The Witness: Project 15 is the fifteenth project we carried through. We made 14 before that: one of the contracts [312] requested by the Navy to investigate or report something which they needed, a gadget or a complete airplane; all in the books.

(Testimony of Edward F. Zap.)

open, and the report—I can report every project we did—blow back and flaps and all kinds of things. And the project 15 is project 15. In the project 15 we made a cargo plane.

As to project 15 relating to a cargo plane, no—it could be so—it could be so on any airplane. I did do some work on a cargo plane in connection with my experimentations. I made a complete report in December, 1941, with 12 pictures and figures of aerodynamic data of performance, and submitted it to the Navy and the Army for a cargo plane, to carry a whole Chrysler tank, 28 tons, for a stretch of 2,000 miles, or carry 20,000 pounds of bombs and material, and what have you, over a stretch of 9,000 miles; the range of that airplane is 16,000 miles without refueling, making possible the utilizing of this lifting increase device.

I later had some discussions in the Bureau of Aeronautics starting a cargo plane. I cannot place the correct date, it was somewhere in—the exact date—the first discussion was on the last visit to Washington in the fall of 1941. I discussed the matter with the engineering division of the Bureau, probably Captain Stevens—Captain Diehl. I had been told by those officials that the Navy—I had been told by those officials of the Navy that it was proper for me to carry on experimentations. The first thing, [313] it was before Pearl Harbor they were interested in having a supply airplane for cargo supply and for bases—naval bases—and after

(Testimony of Edward F. Zap.)

Pearl Harbor, of course, it was for a different purpose, to carry torpedoes to various bases in a hurry.

Mr. Lavine: They have been trying to show project 15——

The Court: Yes.

Mr. Lavine: ——is a cargo plane, and that he had no authority under these contracts, and I am proposing to show he had full authority under these contracts, under TD-5000, and under the discussions he had with the Bureau back there where he was given authority.

That under the terms of the contracts which are here, and which I read in part to the jury, you recall any new experimental work——

The Court: That is right.

Mr. Lavine: —of any discovery, or any invention to it, he had to report back to the Bureau whether it was specifically provided under the particular work outlined in the work section of the contract or not. In other words, the Government was interested in getting anything that could be developed in its interests. Now, had he written a letter back your Honor's ruling appears to me to be that that letter, and the correspondence in connection with it, is properly admissible, but instead of that he went back in there in person and he reported to them the development under these [314] contracts and his discovery.

The Court: That is my point, Mr. Lavine. Is the Government challenging here that he made some

(Testimony of Edward F. Zap.)

inventions and didn't report them? There is no such charge.

Mr. Lavine: I understand they are charging him, if I understand the Government's position here, they charge a certain project which they have called project 15, and which relates to some experimental work that he did, and that should not be properly chargeable to the contract. Now, in defense of that, I am saying——

The Court: Is it the position of the Government that all of that project 15 is not properly chargeable?

Mr. Maury: The Government has two positions here, your Honor. One is, in the first place, it was not properly chargeable, and the books were falsified by failure to enter charges upon the books prior to about the 23rd of October, 1942, while this work had been going on for approximately a year. That is the position of the Government under the indictment. Furthermore, it was covered up by trick, scheme and device.

The Court: Is not the Government's position that project 15 was not either contract, or any account under it; is that correct?

Mr. Bings: That is correct, your Honor.

The Court: Mr. Lavine, what provision in the contract does it come under? I think we can clarify that. I think [315] Mr. Lavine read the instruction there—experimental work should be included.

Mr. Lavine: That is correct, your Honor. The

(Testimony of Edward F. Zap.)

contract calls it, and the contract must be performed under the provisions of TD-5000 which I read, for the balance of the regulation and services called for in each contract, that the Government will pay the contractor the true cost as determined by the Bureau of Supplies and Accounts, in accordance with the treasury decision, TD-5000, of the federal register, pages 2788 and 2797, as amended by IT-3400.

The Court: My point is this, I don't believe that the Government would be chargeable for any work that was done prior to the date of the contract. What is your position on that?

Mr. Lavine: This particular case, your Honor, they would, because that is the contract as I read it before, states that all of the various four contracts are merged with this contract; that is to say, that this is a continuation of four other contracts which he had prior to this one.

Mr. Maury: The witness testified to that. I don't know where it is just now.

Mr. Lavine: It is here. The witness didn't testify to it. I read it out of the contract. Subdivision 2 of the paragraph.

The Court: What is the date of this contract?

Mr. Maury: It is about May, 1942, your Honor.

[316]

The Court: I am not going to invade the province of the jury in these matters.

DAVE ALDEN LICHTY,

called as a witness by and on behalf of the defendant Zap, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Just a minute, Your Honor, I haven't been subpoenaed on this, as a witness.

The Court: You what?

The Witness: I have not been subpoenaed as a witness in this case.

The Court: That doesn't make any difference.

The Witness: I still have to testify? All right. Dale A. Lichty.

Direct Examination

By Mr. Lavine:

I am employed by the Navy Department as a civilian employee; I have been so employed since April, 1942; I work out of the office of the Inspector of Naval Aircraft, El Segundo. That's with the Douglas Company.

Q. Now do you remember an occasion when you were over [317] at Mr. Zap's office some time in 1942 in connection with a bill that was presented to Commander Scott?

A. Well, I would have to know which one, because I was there on several occasions.

The Court: That is right.

Mr. Lavine: Well, I will ask you if in connection with the bill—I will have to get that.

Mr. Maury: I suggest he should be shown the bill.

(Testimony of Dave Alden Lichty.)

Mr. Lavine: Yes, I am getting it.

The Court: Yes, counsel is trying to find it.

The Clerk: You don't know the number, Mr. Lavine?

Mr. Lavine: No, I don't know the number.

The Court: Counsel for the Government may help you, if you tell him.

Mr. Maury: Yes, surely.

Mr. Lavine: It was the bill upon which Champlin testified.

Mr. Binns: I think it is 19.

Q. By Mr. Lavine: Do you recognize that bill?

Mr. Maury: What is it? Government's Exhibit what?

Mr. Lavine: What is that?

The Court: Government's Exhibit what?

Mr. Lavine: Government's Exhibit 19, in evidence, referring to a bill for some work that was done at Daggett Field. [317-a]

The Witness: What's the date of this document?

Mr. Lavine: Well, it must have been some time in October, because Commander Scott certified to it from the 25th of September to October 4th, 1942, so it must have been after that date. The letter does not bear any particular date. It must have been on or before the 16th day of October. Between the 4th and the 16th.

The Witness: Well, I have seen it, yes.

Q. By Mr. Lavine: Were you present when this was presented to Commander Scott?

(Testimony of Dave Alden Lichty.)

Mr. Binns: I object to that as immaterial. Commander Scott is no longer before this court.

Mr. Lavine: It is impeaching Champlin's testimony, your Honor. Champlin made certain statements about this. Now we seek to prove that those statements are false.

The Court: Well, then, just eliminate the defendant Scott and ask if Champlin was present.

Q. By Mr. Lavine: Who was present on that occasion?

A. Well, there was Commander Scott, there was Mr. Champlin, Mr. Hanley, Mr. Byars, Mr. Zap, and a third, or another party, in the back of the room, at a drafting table, whose name I do not know.

Q. What did Mr. Champlin say on that occasion?

A. Well, he handed these papers to Mr. Scott and said, "Here is the bill—" or "—papers on the employees that [347-b] went down to Daggett."

Q. And what was the reply to that?

A. Well, as I recall, Commander Scott looked at these papers, "Well, how do I know they were down there?"

Mr. Binns: I object to that, your Honor, and ask that the answer be stricken as beyond the issue of this case, hearsay.

Mr. Lavine: It certainly is. It shows Champlin's statement here was incorrect.

The Court: Well, it is your position they cannot challenge a statement made by the Government on a material point of evidence?

(Testimony of Dave Alden Lichty.)

Mr. Binns: I submit, your Honor, this is no longer a material point in this case.

The Court: They are challenging the statements made by Champlin, who is one of the witnesses of the Government. Isn't that material?

Mr. Binns: If it is anything that was said by Mr. Zap, your Honor, it would be material. As to anything said by anyone else, it is not material.

The Court: But here is an agent established here of Mr. Zap, and we have permitted the acts of his agents who were fully advised to be introduced in evidence. The books, the records, they were all made by his agents. If I adhered to that, I would have to exclude all of those books and [317-c] records, because Mr. Zap never made any of them, but they were made by his agents, and authorized. On that basis, I think, counsel, I will admit it. Proceed.

Q. By Mr. Lavine: Just state what Commander Scott said.

A. Well, Commander Scott said, "How would I know that they were down at Daggett?" He said, "Have you checked and can you verify that they were there?"

Mr. Champlin said, "Yes, they were there."

And Mr. Scott turned to Mr. Byars and said, "Have you verified this?"

And he said, "Well, all you need is to certify as to the time."

And Mr. Scott called for a stenographer to take this letter or bill and have that certification typed on the side, and they called and Mrs. Hanley came

(Testimony of Dave Alden Lichty.)

in the room and took the paper outside and was gone about eight or nine minutes and came back with this typed on the side, and Commander Scott signed it. [317-d]

Los Angeles, California, Friday, April 16, 1943.
10:00 A. M.

WILLIAM L. BUTLER,

called as a witness by and on behalf of the Defendant Edward F. Zap, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

I am associate aeronautical engineer, civilian, for the United States Navy. I have been connected with the United States Navy since 1929, 14 years. Prior to that time, I was aeronautical engineer for the United States Army—up to 1917 to 1924 as inspector, and later aeronautical engineer for the Army. I am now stationed at Douglas, El Segundo airplane plant for the United States Navy. Throughout the year 1942, I was stationed at Douglas, El Segundo, and also all the plants that are under the cognizance of that office for the United Sttaes Navy.

During that period of time I had occasion from time to time to examine the work done by E. F. Zap. My duties in connection with that work were to check that work to see that it met the contract

(Testimony of William L. Butler.)

requirements and the specification requirements, the Navy specifications.

I am familiar with contract 83142 and the contract 4105, contracts held by Mr. Zap. I checked his work in connection with the University of Washington wind tunnel in connection [318] with the contracts; all that was permitted for forwarding I did. It complied with the contract requirements or I would not have approved it for forwarding. That was my job, to see that they did comply with the requirements.

In the month of September, 1942, or thereabouts, I had a conversation with Mr. Zap in relation to some of the reports that had been submitted; off and on, yes, I had to talk to Mr. Zap.

On the engineering work I don't recall any specific instances; on the inspection work on the floor, where something was built, it satisfied the requirements as I was concerned, and I said—or Mr. Zap said to me, "We are in a hurry; we are behind time," and I made the statement on one occasion to Mr. Zap, "That was satisfactory to me, good enough for the job it was supposed to do." And he said, "No, I don't want it that way. I want it better than that. I want it as good as we can build in the airplane for the United States Navy." That was more structural than engineering. That was actual construction.

I am familiar with certain work done by Mr. Zap in connection with what is sometimes called a cargo

(Testimony of William L. Butler.)

plane. I remember that cargo plane report. That was submitted to me for my examination.

Q. By Mr. Lavine: Mr. Butler, as an engineer for the Navy, have you an opinion as to the value of Mr. Zap's work in connection with the Navy?

[319]

Mr. Binns: I object to that, your Honor, completely irrelevant to the issues in this case.

The Court: Sustained.

The Witness: In connection with this cargo plane project and the matter that was submitted to me about it, the matter of completing the idea in his mind of what he wanted to do, he could sit down and make that report in two weeks' constant work, constant attention, one man, I believe so. That was furnished to me simply in comparison with another amount of work that was committed to me. It was just one report. I would like to bring out this point. A person who would sit down and make a general over-all in this case of an airplane, design the wing, how everything worked for an approved airplane, can go into hundreds of engineering hours; that would amount to many hours of designing in a complete over-all design. That is why I say one man could make such a report in two weeks.

Cross Examination

By Mr. Binns:

I do not recall that this cargo plane that you referred to, was known as project 15. I believe I did see wind tunnel data in connection with that plane.

(Testimony of William L. Butler.)

I read that complete report and I believe there was some—there was some wind tunnel data in it—in connection with it.

Q. This cargo plane, was that in connection with adapting a Zap flap to a Grumman plane? [320]

A. The other way around. A Zap flap could be adapted to the cargo plane.

Q. Will you please just answer the question? Wasn't a cargo carrying plane used in connection with adapting a Zap flap to the Grumman plane?

A. No.

Q. Was it in connection with adapting a Zap flap to the Sikorski plane?

A. No, I couldn't say that it was.

Redirect Examination

By Mr. Lavine:

I am the officer through whom reports are forwarded from—I am the first officer to whom reports are presented to be forwarded to the Navy; that is my job, yes, sir.

HARRY S. MAGILL,

called as a witness by and on behalf of the defendant Edward F. Zap, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lavine:

The Witness: My name is Harry S. Magill; I am an aeronautical engineer; have been such since

(Testimony of Harry S. Magill.)

1926; I worked for Mr. E. F. Zap from June of 1940, until December 31, 1941, as Chief Engineer.

Mr. Zap and I worked together to try to figure out a [321] proposal to the United States Navy for cost for test flights. We worked on that approximately three weeks, as near as I can remember. The proposal was to cover the entire flight program to prove the airplane in accordance with the design so it would be okay to submit to the Navy.

There was a proposal of $4,000 made.

Exhibit 3 in evidence is the proposal that we worked out. It refers to contract letter 143 with the provision "Chief Test Pilot fee and insurance $4,000." It is dated January 29, 1942.

The preliminary form was worked on in the latter part of 1941. We had planned to make the flight test sometime about that time, but it is entirely dependent upon the date of completion of the device for the airplane.

There was discussion between me and Mr. Zap as to presenting the proposal in the form of a fixed-fee item.

I am acquainted with the various items that go into making a flight test. Besides the actual flying of the airplane, there are a number of items involved from the standpoint of preparing for the flight; the program must be laid out thoroughly from an engineering point of view; arrangements must be made for airport and hangar space; the fuel and oil must be provided; a ground crew for

(Testimony of Harry S. Magill.)

maintaining the airplane during the test must be arranged for and their salaries. The pilot himself must be contracted for, and, in addition to that, you have insurance on the airplane, insur- [321-a] ance on the personnel work around the airplane, and insurance on property that might be damaged in the event of a crash of the aircraft. Also definitely insurance on the pilot. Also on anyone in the plane at any time it is being flown during the tests. Other costs or charges in connection with flight tests are the transporting of the airplane to and from the factory, if the factory has no airport adjacent to it, and expenses for the personnel during their stay away from the factory, during the tests. As a rule the transportation of the pilot from the place where he is going to fly is agreed upon at the time the pilot is contracted for.

I went back to Washington with Mr. Zap on two occasions; I also went to the University of Washington with Mr. Zap and did work in the wind tunnel. I went to the University of Washington on several various tests, but not in December, 1941. I went under another contract, and also for this contract. The wind tunnel tests were different from the field tests. The wind tunnel tests were carried on at the University of Washington. I was not in Mr. Zap's employ at the time the flight tests were made, but was when wind tunnel tests were made earlier in 1941 under Contract 83142 at the University of Washington. On one occasion, under the contracts

(Testimony of Harry S. Magill.)

here, I went up to the University of Washington myself and ran tests on tail surfaces. That was rather early in the year; I don't remember the exact date but I would say between the first of the year and the middle of the year. That [321-b] was my last trip there. I had gone up there with Mr. Zap though. I saw Mr. Zap pay students personally.

Cross Examination

By Mr. Maury:

The Witness: Government's Exhibit 3, and particularly the letter therein of January 29, 1942, was written almost a month after I left Mr. Zap's employ. In the original preliminary estimate, before I left, I inserted that figure "$4,000." I based that figure on the pilot's fee and any expenses incurred necessary for him to carry on the flight test. As an engineer I did not study out what the pilot's fee would be. Mr. McAvoy came from San Francisco on a special trip to talk in regard to taking on this job; he and Mr. Zap made the arrangements for his fee at that time; that was before we made the estimate. I sat in on most of the conferences, the first of which, I would say, was around August of 1941. This took place in Mr. Zap's office at 1005 Broxton Avenue in Westwood. Mr. McAvoy was in town for about two days and was beginning to familiarize himself with the characteristics of the airplane he was going to have to fly. Leaving out the technical discussion, and getting down to the financial figures, I did not discuss finances directly with

Mr. McAvoy. That was entirely up to Mr. Zap. I did not discuss these figures with Mr. McAvoy, but I know the outcome of the discussion, as Mr. Zap and I had to discuss that work [321-c] together in forming the proposal. Mr. Zap told me the outcome was that Mr. McAvoy was to have a flat fee of somewhere around $2500, as I remember, exclusive of his expenses and whatever things were necessary items that came up that would be thrown in on the flight test program.

Redirect Examination

By Mr. Lavine:

The Witness: Mr. McAvoy's fee was definitely to be a fixed fee; that was to be $2500, plus whatever expenses he would incur.

Mr. Zap discussed with me on several occasions whether or not the flight test should be on a fixed fee basis or cost plus basis.

Nothing was said as to how many trips Mr. McAvoy was to make in connection with the flight.

Mr. McAvoy was to be paid directly by Mr. Zap.

[321-d]

EDWARD F. ZAP,

recalled as a witness in his own behalf, having been previously duly sworn, was examined and testified further as follows:

(Testimony of Edward F. Zap.)

Direct Examination
(Continued)

By Mr. Lavine:

Q. Mr. Zap, we heard considerable about cargo planes yesterday just about the time court adjourned. Will you tell us about when this cargo plane was conceived by you?

A. The first thing was in December, 1941. I had a previous discussion with the Bureau about cargo planes.

The Court: He has told us about the cargo plane and when he first had his discussions with the Navy about it in Washington.

The Witness: I was not doing any work during the period we have discussed here in 1941 and 1942 for anybody but the Navy. The Navy at times gave me directions to assist other branches of the Government service. They sent me a letter authorizing me to release—I followed the instructions in the letter, to supply information to such and such a company.

In connection with this so-called cargo plane, I sent a letter to the Navy Department. I submitted a report to the Navy Department on it, a report, project 15, cargo plane, in December 1941.

In reference to a report marked "Confidential, Zap Upper Surface Flap, Zap Controllable Lift Wing, Preliminary," that report contains the whole story about the cargo plane; [322] the submittal to the Bureau. I submitted that report to the Bureau

(Testimony of Edward F. Zap.)

of Aeronautics in Washington, D. C. It went the regular channels, via the Navy inspector, to Washington. It was examined here by the Navy inspectors, Commander Smith, and so on, and then it was forwarded to Washington.

The Clerk: That will be Defendant's Exhibit MM; into evidence.

(The document referred to was marked as

DEFENDANT'S EXHIBIT MM,

and was received in evidence.)

Mr. Lavine: I would like to read the first part of this exhibit MM, in evidence.

"Summary

Results are given of recent tests on Zap Controllable Lift Wings in combination with leading edge auxiliary purposes. Optimum combinations attained a CL max. of approximately 4.00 which was accompanied by much smaller pitching moments than are usually associated with high lift devices, thus making possible a considerable reduction in required tail area. A general specification for a load carrying airplane as dictated by military necessity is presented and an airplane designed to take full advantage of the Zap high lift devices is postulated. Several alternative power plant installations and alternate arrangements of the various basis components are suggested. Curves are presented showing estimated [323] flight perform-

(Testimony of Edward F. Zap.)

ances for a hypothetical airplane of 87,500 pounds gross weight. The empty weight is estimated to be 25,000 pounds, thus giving a ratio of gross to empty weight equal to 3.5."

And there follows a copy of all the curves and the diagrams and the pictures of the plane.

I am now reading from another page.

"Provision is made in Design A for the installation of four motors by which means the power plant may be doubled. It must be appreciated, however, that the plane was originally designed for comparatively slow speed, high-load performance, and consequently will not be operating at maximum efficiency with this additional power. A comparison of the resulting performance is of interest nevertheless, as being indicative of the performance to be anticipated in a design adapted to fighter performance.

The two additional engines will weigh approximately 5500 pounds, to which should be added a reasonable amount for engine mountings and the increased structural strength required by the higher velocities and heavier air loads to be imposed. Therefore, a round figure of 10,000 pounds has been added to the empty weight of the two engine plane, thus raising the empty [324] weight to 35,000 pounds. The gross weight remains unchanged, therefore the 10,000 pounds additional weight will be deducted from the available useful load.

The 4-engine performance has been based on

(Testimony of Edward F. Zap.)

the military rated power of 1855 B.H.P. at 24,000 feet. Counter-rotating propellers of 15.4 feet are designed for maximum propulsive efficiency at high speed at this altitude. The curves of power required for the two-engine design have been assumed to apply with sufficient accuracy to the 4-engine version.

A summary showing the resulting performance in comparison with the two engine version is given in the following table:"

And then follows tables showing the performance of normal rating planes and of military, 4-engine planes:

The Witness: Subsequent to taking this matter up with the Navy, I was referred to some other branch of the United States Government by the Navy. I was sent to the Army. At the Army, I saw Colonel Craigie, in charge of new projects. It was on the way home from Washington, D. C., via Dayton, Ohio, to Los Angeles.

It was on the way back from Washington, D. C. I stopped in Dayton, Ohio, to the Army materials center, and discussed these things with Colonel Craigie, the chief of new [325] procurement and new designs, at the recommendation of the Navy. I submitted my proposal for the cargo plane at that time to the Army. I wired for a second copy of the report and waited for it, and forwarded it to the Army. The connection between the cargo plane and the other work I was doing for the Navy was simi-

(Testimony of Edward F. Zap.)

lar, the same, around the same thing, involving flaps and ailerons, the new development.

The relationship between the cargo plane and the other experiments that I was doing on the Grumman and the Vought-Sikorski was this. The thing started as project 15, cargo plane, and the "cargo" was struck later on and the "Project 15" was maintained, because on the cargo ship we needed thick wing sections, and later on in the year we needed for the Grumman a thick wing section, for ammunition boxes, and we had to go to the same thickness of wings, so we carried on the same project number and went in the wind tunnel to investigate the thick wing section, the effect of the downwash to the tail. The photographs and the report explain clearly the purpose of those tests. The reports were sent in to Washington.

I stated that I received instructions from the Navy to take up certain other work with the Army and other work in connection with my Zap flap. I wrote a letter dated February 10, 1942, after I received the letter of invitation to submit such things to the Army; an authorization from the Navy and an invitation from the Army; there are two letters, and a [326] telegram. I was conducting these tests at the University of Washington, and all of them, I honestly believed that they came within the terms of my contract—every one of them. And in making my reports on my work I honestly believed that they

(Testimony of Edward F. Zap.)

were in full compliance with each and every provision of the contract with the Navy.

My office staff made out the invoices that were made out to the Navy. My office staff checked and presented them to me. And when those were presented to me, the basis I signed those invoices was that I relied completely on my staff. They gave me something prepared. And that's what they were there for.

I did not at any time ever knowingly or willfully present any bill, either on September 23, 1942, or at any other time, which I believed was not performed in accordance with contract NXs-4105, or any other contract with the United States Navy.

I did not at any time knowingly make or cause to be made or use a false bill, receipt, voucher, roll, account, claim, certificate or affidavit, knowing the same to contain fraudulent and fictitious statements and entries.

Referring to Government's Exhibit 19, a letter dated October 16, 1942, that was presented by my office staff. They laid it before me, Mr. Champlin. As to whether I remember the particular circumstances of signing that—or remembering how many papers or whether that was alone, there [327] never came a single bill. A cluster of them. Mr. Champlin gave me a pack of things to sign. Invoices to sign —I never paid much attention to it.

By Mr. Lavine: Now, Mr. Zap, do you remember the circumstances surrounding a check that was later

(Testimony of Edward F. Zap.)

—let me give you the check, Government's Exhibit No. 7, in evidence. Just state all the circumstances as you remember regarding that particular check.

The Witness: We had to go to Daggett, continue the flight test at Daggett Field, and before leaving I asked Mr. Browne what does he want in the way of information or confirmation of our records about the flight test fees and insurance, because we had already paid a large amount of insurance fees and our incidental expenses.

He advised me—anyways, either I sign a check and have it endorsed there by Mr. McAvoy, or advised—I can't recollect correctly. All I remember is I signing a check and Mr. McAvoy endorsing it; or it was made out to Mr. McAvoy, and him signing it. Something around that. Anyhow, I received a blank check, from Mr. Browne. We have those checks showing to which account; and the number, that is taken out, it is entered in the books for what purpose the check is, and to which account it goes; and there is written, of course, in the left corner "3-15A." That refers to all these quotations and stuff. In other words, the check is pinned down for which account or which part of the perform- [328] ance it goes.

My job was, now, to sign the check or get the endorsement from Mr. McAvoy. And I knew we were going up to Daggett, and anticipated—Mr. McAvoy was with us already over ten days, he was anxious to go back—anticipated after the flight test

(Testimony of Edward F. Zap.)

is finished that he might jump in the airplane and go right back to San Francisco; so I intended to take the check with me and have it signed by him. Then what really happened, I think, half a day or so later, or the same day, I saw Mr. McAvoy in the office before we went to Daggett Field, and I asked him in the office "Mac, will you sign the check, that I can turn it over to the accountant to have a record for our own office that this thing, this particular item is cleaned up?"

And he countersigned this thing, and I don't remember clearly, I think I took that check with me. We were in a hurry to go to Daggett Field, the plane was flying out there with McAvoy, and I believe I took that with me to Daggett Field and had it all the time out there in my pocket, and when I came back to Daggett Field—yes, I remember clearly I had it at Daggett Field because I cleaned out a pocket in the hotel, and I had that check with me.

When I came back I went to Browne's desk, or Miss Boyle's desk, signed the check, I said this is what Browne is asking for.

That is all I remember about the check. [329]

I did not direct anyone to fill in any amount on that check. I didn't recall at that time how much. I didn't have those figures in my mind. I had the flight test in my mind.

I did not at that time or at any time intend to use that check in any way to make any false record or false account or false accounting in my books. This

(Testimony of Edward F. Zap.)

was my own check and my own account, writing it out against my own account. I didn't know the purpose what Mr. Browne needed.

In presenting the claim to the Government for $4,300 in connection with that flight test, it was my belief that that item was a fixed price. If I am permitted to prove it, I will prove it right now. I honestly believed that it was a fixed price. And I did then.

Now, in connection with that particular item of account, the contract or the letter calls for "flight test and insurance." It says here specification 38C. It says report No. 135, proposed preliminary flight demonstration. That report explains clearly what has to be done at fixed prices and what has to be done on cost plus. The standard Government test is fixed. This is a standard fixed thing. We did it before and we did it afterwards. That very same letter which counsel has in his hand. The second to the last paragraph states it.

January 29, 1942, Government's Exhibit No. 3, in evidence. It says additional flight tests have to be done. It says [330] very clearly there.

Mr. Lavine: "It is the contractor's intention to make additional flights to determine results of various aileron-vane settings, tuft tests for observation of flow characteristics, take-off and climb tests involving various flap positions, minor aerodynamic investigations and adjustments to enable the contractor to submit the subject airplane for final

(Testimony of Edward F. Zap.)

demonstration in its most advantageous condition. For this reason it is highly desirable to have flights after the first pilot's familiarization flight."

The Witness: That other letter which the Government counsel mentioned is the other one.

Mr. Lavine: It has a reference to enclosure A: "And make observations useful to the Bureau of Aeronautics." I assume that is what that is. "Bu-Aero."

The Witness: When I was conducting this flight test, I had paid other items in connection with the flight test than just the pilot's fee. There is a manyfold insurance item in there. The insurance items which I am required to make for my own protection. The items of insurance that I placed on that flight test were pilot's insurance, liability insurance to employees when they get hurt, damage insurance in case the airplane crashes on a barn or a house, ground insurance. There are six types of insurance. I can't remember it without looking in the records, correctly. Six different types of insurance I am required to make. And there is another [331] group of insurance which are required for the Government, which were cancelled.

One of the witnesses testified that insurance covered all the members in the plane that might be injured at the time of the flight; that is correct. There was about $1600 worth of insurance. There were two firms, Lyddy Zweigart, Harry H. Kem handling my insurance and I made a check with

(Testimony of Edward F. Zap.)

Harry H. Kem as to the insurances that were taken out on my flight tests.

The first type of insurance is flight test liability insurance in the operation of my business. That means any employee comes around an airplane and the propeller flies off and he gets hurt, I have to be protected to cover him. That letter says that was for $297.05 paid on August 31, 1942.

The next item, August 1, 1942, policy WC 426501-A, Workmen's Compensation on all employees with the exception of actual flying. You see, the first one is business. This is working around the airplane. Then comes the next insurance—this was $150. The next insurance is August 27, policy No. 6 EA-375, Aetna Casualty Company, policy covering accident insurance for Mr. Dale while flying. Mr. Dale was the co-pilot on the flight tests. He was flight engineer. This policy covered accident insurance of Mr. Dale while flying, or related—$250, here it is, and paid.

The next insurance item is—no. For $135 of $10,000, [332] for Mr. McAvoy, for a period of ten hours, and for every additional hour's flying in an airplane I have got to pay $13.50. Mr. McAvoy flew 31.8 hours, total flying time. Additional fee had to be paid for Mr. McAvoy, there is a notation here, $283.50. I don't recollect if he's paid or he's not paid, I don't know.

The next item is policy taken out August 25th, policy No. 96 C-335, U. S. Aviation Underwriter,

(Testimony of Edward F. Zap.)

covering Workmen's Compensation on all aircraft operations. "This policy was written to cover your liability for employees flying in any type of airplane other than commercial airlines on regular schedule." It amounts to $251, and the premium was paid.

I am not sure about that next item. We took another insurance out here August 25th. "We issued binder No. 3475, U. S. Aviation Underwriter, covering crash insurance." I think this is a Government insurance which was cancelled later on. Without looking at the records I can't explain that situation.

The next item is August 20, 1942, binder 3474, U. S. Aviation Underwriter, covering comprehensive insurance on OS2U-2, of $80,000. This binder was for ground coverage only and did not include any crash insurance. The short rate premium on 30 days was $560. I am not sure. I think this is the insurance I am required to have in case the airplane under transport out to the field burns up and I have to replace it; or it might be insurance which the Government [333] cancelled later on. I don't know. Without looking the records up I can't tell.

Then there is another insurance here, August 29th, binder No. 3476, U. S. Underwriter, covering public liability and property damage. The limit of this was $100,000 public liability and $50,000 for property damage, and the premium $77.80, was paid.

Then there is a discussion here in that letter about insuring Mr. Dale extra, but it doesn't quote. I think that was said in the beginning of the letter.

(Testimony of Edward F. Zap.)

Then there is my insurance; it was at that time paid, $122.70, policy 1165680. When I speak of my insurance, that is insurance while making the flights. As I recollect, I took insurance out and I was mistaken in it. You see, I was insured, and it turned out I cannot fly an experimental airplane, only after the Government has approved that airplane, so I was actually not insured, and I was supposed to pay an additional premium. If I paid it or not I don't recollect now without looking up the records. But we paid $122.70 for me. That is all.

In addition to the insurance, I paid other expenses of Mr. McAvoy. First is fee, which I have a notation here, $2,075; $300 cash, and $200 check, plus—I believe there is a petty cash of $50, which I don't know where it belongs to, but he probably got the petty cash of $50 when he went——

There is a stub in the petty cash of $50 paid to Mr. [334] McAvoy, made out by Miss Hanley. I recognize that invoice—this is Miss Hanley's handwriting, and it says "Mr. McAvoy, 10-6-42, $50, flight test fee part." I found it in my office records.

The Clerk: Defendant's Exhibit PP into evidence.

(The document referred ~~to was received~~ in evidence and marked Defendant's Exhibit PP.)

The Witness: Other expenses of Mr. McAvoy that I paid were his travel expenses from home to Los Angeles, down here, and his hotel bills and his food. I have notations here. $9.09, Claremont Hotel. $41 twice, two times forty, traveling reimbursement

(Testimony of Edward F. Zap.)

to Mr. McAvoy to San Francisco and back. He went twice to San Francisco and back, so that makes $82. Then I have $155.80, expenses for a conference. We went to Moffett Field to obtain some instruments from the N.A.C.A., and Mr. Dale went up there and had a conference with Mr. McAvoy and another test by Clousing, to line up the flight. [335]

Los Angeles, California, Friday, April 16, 1943.
1:30 P. M.

W. L. BUTLER,

called as a witness by and on behalf of the Defendant Edward F. Zap, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Lavine:

Q. Mr. Butler, certain questions were asked you this morning and I want to ask you now if since the questions asked you, if you can tell me if the experimental work done in the wind tunnel in relation to the work under contract NXs-4105?

A. Yes, it could. Through the determination of a desirable wing section for a thicker section.

Cross Examination

By Mr. Binns:

The Witness: This report marked defendant's Exhibit MM, does not look like a copy of the report

(Testimony of W. L. Butler.)

I referred to this morning as the report I saw on the cargo plane. That report, as I recall, was several times thicker than the Exhibit.

Redirect Examination

By Mr. Lavine:

The Witness: Examining this report, it is part of the [336] audit I saw in the more complete report; this familiar—that sketch—the same thing.

Recross Examination

By Mr. Binns:

The Witness: When I said, "It is the same thing," I meant that the part I looked at was the same. The pictures look identical with something I saw in the larger report.

EDWARD F. ZAP,

called as a witness in his own behalf, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Lavine:

Q. Mr. Zap, this morning I asked you whether you were working entirely in connection with matters of the Navy, and whether you secured permission to do any work for any [336-a] other agency or persons from the Navy involving any matters taken up, and you said there was correspondence between you and the Navy.

(Testimony of Edward F. Zap.)

The Witness: Defendant's QQ is a letter which I received from the Navy Department on January 21, 1941. The work that was stated in this letter had to do with these two contracts. It related to the rules of information regarding Zap flaps and ailerons.

(The document referred to was received in evidence and marked Defendant's Exhibit QQ.)

The Witness: I addressed a letter on April 20, 1942, to Commander Walter F. Diehl, now Captain Diehl, in the Navy Department, Washington, D. C. I received a reply from Commander Stevens of the United States Navy on April 21, 1942, in relation to that report. They have a relation to Counts 1 and 3, the experimental work that was being carried on in the wind tunnel.

The Clerk: Defendant's Exhibit RR into evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit RR.)

Mr. Lavine: I would just like to read the last paragraph of Defendant's Exhibit RR in evidence.

"What is now required is a comprehensive investigation of the entire subject for the purpose of establishing the basic principles involved and the determination of sufficient data for general design purposes. [337] One has but to consider the vast amount of money and time already expended in research upon the split flap and conventional ailerons to appreciate the

(Testimony of Edward F. Zap.)

extent of the program ultimately required to explore fully the possibilities of the roll-out type flap and upper surface aileron. However, in consideration of the military significance of this development, it is felt that everything possible should be done to get this work under way at the earliest possible moment. Considerable additional tunnel work as well as further tests on the Navy Fairchild in the full scale tunnel and in fact will probably be required. In any event we will be happy to cooperate in every way possible in any program you may consider advisable.

Yours very truly,

EDWARD F. ZAP."

The answer of Commander Stevens "subject: From the Navy Department, Bureau of Aeronautics.

"Subject: Experimental program—Proposed for additional work"——.

The Court: Pass it to the jury, counsel—they can read that.

The Witness: After I received these letters for release of technical information in connection with the Zap flaps, I received a subsequent wire from the Lyster-Kauffman Aircraft Corporation, requesting me to furnish them some [338] data for work on an Army plane. I subsequently sought authority from the Navy to give them that information and received that authority.

(Testimony of Edward F. Zap.)

The Court: What is the materiality of this, Mr. Lavine?

Mr. Lavine: Just along the same line that all his work was done in connection with the Navy, and he did nothing, your Honor, outside of Navy work, unless he got permission from the Navy.

The Court: There is no contention he was working for any other company here, is there?

Mr. Lavine: Yes. The Government's contention was he had a private project, your Honor, not connected with anything with the Navy, and I am endeavoring to show all his work was done for the Government, whatever its nature was.

The Court: Let's get that straight. I don't think there is any evidence or any contention here that he was doing work for any other person, firm or corporation, during this time, but the Navy. I understand that. You don't mean he couldn't, if he thought of some other design, or something else, that he couldn't do that other work; that he couldn't work on it; he couldn't experiment with it?

Mr. Lavine: No. Under the contract and under TD-5000 encourages that, but says if he does it he has to——

The Court: Then what is this point of working for somebody else?

I sustain the objection.

Mr. Lavine: All right. [339]

The Witness: There were other expenses in connection with the flight test outside of the insurance

(Testimony of Edward F. Zap.)

and the pilot's fees and the pilot's expenses. I have here a notation—$200, travel expenses for Mr. Dale.

Mr. Lavine: Mr. Zap, what are you looking at? What is your memorandum?

The Witness: Just a piece of paper I collected the data from the correspondence that we paid for—just a memorandum for myself, which can be taken out.

$200, travel expenses to Mr. Dale to flight with experimental airplane to Anacosta was paid with a check, No. 2701, money advanced to Mr. Dale to fly to Anacosta with that airplane with a Navy pilot. And another $200 to bring him home. He was short of money.

The total amount spent by us, or incurred by me, for the flight itself, fees and insurance, and other expenses, to my best knowledge and belief: according to my memorandum it took some $4,587.64 to $4,787.64. I am not sure. We might have billed to the Government, in some form, one of those instances of which I am not sure, might apply it to the Government or not. Those figures were $4,587.64 to $4,787.64. I am not sure, something else might have popped up somewhere else. I just didn't have time.

In connection with the flight test charges, I never signed anything, except an invoice. After the work was done I did not sign or see anything except an invoice. [340]

I honestly believed that these charges that I billed

(Testimony of Edward F. Zap.)

the Government for on that invoice were just and correct, I now still believe that they were just and correct.

I did not at any time attempt by any scheme, or trick, or device, or other means, to present that item or claim as a false claim to the United States of America.

I did not at any time instruct anyone to make any false, or fraudulent, or fictitious entries, in my books in connection with that charge.

At the time that invoice was prepared, Mr. Champlin was keeping the accounts of the insurance at my place of business, at that particular time. Mr. Champlin secured the bids for the insurance.

A letter from the Lyddy-Zweigart Insurance Company, Defendant's Exhibit TT for identification, was one of the companies that was bidding on my flight test insurance. That letter is addressed to Mr. Harry Champlin.

(Mr. Lavine passes the exhibit to the jury.)

Witness (continuing): I went to Daggett Field in connection with the experimentation work and the flight test. I was up there about ten days, during the time that those flight tests were on. I was worrying about the flight test figures. I was attending to the engineering figures, and to the actual flight itself, and the flight itself to make the airplane work properly as intended.

While I was up there and after I went up there, they [341] all got dysentery up there from the water

(Testimony of Edward F. Zap.)

and heat conditions, and some of the persons left and came back.

Q. Now, did you certify to the men and amount of work that was done up there? A. I did.

Q. And what were the expenses under which you signed that certification?

A. It was laid before me, prepared by my office staff. I signed it.

Mr. Champlin laid the papers before me. As usual a rush in the office; particularly, after the flight test was over. He said that he wants to submit the paper to the Navy auditing. I believe he said, "Mr. Byars is over in the office somewhere," and I should sign the paper. I took a pen and signed it. I did not examine it closely and minutely. I honestly believed when I signed it that it was true and correct.

I never made any representation to Hilton Byars as to any item of expenses. I never made any representation to Mr. Hilton Byars. I never asked or said anything to Mr. Byars.

I had numerous little difficulties with Mr. Champlin. They first started somewhere in the spring or in the early part of '42—1942. He left after closing in the evening, left the desk completely untidy, papers and stuff laying around, and he often when he conferred with me and brought papers to me to explain, and wouldn't, but left them on my [342] desk, and I called his attention to it and I said, "This is not the way we like to run our business.

(Testimony of Edward F. Zap.)

When anybody leaves his desk in the evening the desk might have been cleaned under executive orders." The next thing there was some cheating going on with the time clock.

I discovered one time and I saw a spare time clock in one of the filing cases next to Mr. Champlin's and Mr. Hanley's desk, and the time clock was used to punch in or punch out time at their leisure. I watched these things and I found out that the time clock of Mr. Champlin and Mr. Hanley were punched in 9:00 o'clock in the evening and I did not recall seeing him there the night before, and I asked Mr. Champlin then, "Where were you yesterday," just casually—"I was at the draft board," pertaining to a meeting it would take some time to fix up somebody's draft questions, and we agreed to make that out—used to work overtime every Tuesday, Thursday and Friday, from 6:00 until 9:00 o'clock, and I noticed that on all those days Mr. Champlin, about 80 per cent of the time, was never there evenings, and I asked him several times, and he had always an excuse that he was at a draft board, or buying tires, or getting some tires for the employees. And it occurred so often and I got suspicious and he gave me another excuse one day, and I simply took the telephone call to the draft board, called up the draft board—I know the foreman of the board—and I said, "Was Harry Champlin there yesterday?" He said, "Yes." "What time he [343] came there?" Well, he said,

(Testimony of Edward F. Zap.)

"I don't know what time he came. We close at 5:15." And I went back and took the time card and here is punched at 9:00 o'clock evenings and I personally know he was not there that evening, so I took the time clock and went to Mr. Champlin and I said, "How about this thing? Where were you?"

And, "Oh, I had an awful headache," or some kind of an excuse that he was sick and at home and forgot about it. I said, "Who punched your time clock in?"

"Oh, Earl Hanley did that." And then I went in the files and found the second time clock right at the desk, and I said, "What is that time clock here for? Supposed to be in the safe in a great big room, and a great big quarrel started and Mr. Hanley came around and said, "Are you accusing us of cheating?" And I don't want to spread all kinds of gossip around here. That was one argument. Then I got Mr. Champlin in and on several times again he stamped in his time at 7:00 o'clock in the morning, and officially the hour to start work was 8:00 o'clock, and he used to sign the time check with somebody else, he held the pay checks and I saw $110, so I asked for the time cards and looked over how it could be that he gets $110. And here I saw time cards stamped at 7:00 o'clock in the morning, so I went to Mr. Champlin and I said, "Mr. Champlin, our office time is starting at 8:00 o'clock," and he said, "Well, Mr. Zap, I work must better in the morning. I am an early bird. I am up at 5:30

(Testimony of Edward F. Zap.)

and I would rather work while it is quiet in the office and I like to work [344] in the morning." So I tried to check up on that situation, and I had at one time stress men helping from Lockheed Aircraft, who was also an early bird, and he had to go during the day to Lockheed and work, so he worked in the morning and came evenings, and I saw him—I said, "You were there at 6:00 o'clock in my office to fix up a report?" "Is Mr. Champlin there?"

"Yes. I saw him come in at 7:00 and he goes out into the coffee shop with a motorboat or sailboat magazine and sits there," so I made it my business once or twice to go into the coffee shop and saw Mr. Champlin sitting reading a motorboat magazine and charging time to the company, so another quarrel started along that line.

Without going into all the quarrels that I had, I took up the matter of discharging Mr. Champlin sometime before I left for Washington. I had some discussion with Mr. Browne, my auditor, about replacing him. I asked three or four persons in my office—I asked Mr. Browne about it. I didn't talk to Mr. Champlin again about discharging him, before I went.

I had someone else in charge of my place while I went to Washington. That was Mr. L. Weaver. I gave Mr. L. Weaver instructions regarding the running of my office. I hired Mr. L. Weaver, to the best of my recollection—about three or four weeks before I went to Washington.

(Testimony of Edward F. Zap.)

The purpose of my trip to Washington was to follow up [345] the test flight and the beginning of the Government tests in Anacosta. Flight tests were continued in Washington while I was there. After I returned from Washington, I fired Mr. Champlin, the first day I returned.

Cross Examination

By Mr. Maury:

Yesterday I testified (page 1366 of the Transcript) in response to the following question:

"Q. Has any work been done on that contract at all?"

That was on the contract of September, 1942, and I responded as follows:

"A. A little. We started. Usually in the last year or two years we started ahead of time. You see, the moment we get a letter of intent that the Bureau needs something; that is the green signal, and we went ahead and started the work."

When I referred to a letter of intent, it is not very clear to myself what a letter of intent is. That is, I get a letter from the Bureau, it says—I have several of them in the correspondence which says this and this, "the contract is coming" or "we are making a contract in the early stages," and I assume that was a "letter of intent." And then later I get an education and find in the Bureau there is a special [346] form of letter of intent.

(Testimony of Edward F. Zap.)

I learned that on one of my visits to Washington, which one I couldn't recollect, I made so many. I couldn't tell if it that was in 1942, or 1941; my best recollection is, it was around in 1942. But I had letters from Washington which I thought were letters of intent prior to that time.

To go on with my explanation of what this "letter of intent" is, I still didn't know very clear, 100% myself. If I can look in the correspondence—I have a letter of intent somewhere in that file.

The Witness: This is one type but there were other types.

The Court: You may resume the witness stand, Mr. Zap.

(The witness handed Mr. Maury a document taken from his files which was then marked by the Clerk as Government's Exhibit 57 for identification.)

The Witness: I believe that Exhibit 57 for identification is supposed to be a letter of intent. Something similar. Those forms change. This one pertains to contract No. 83142. It is dated 12 March, 1941. The date of the contract is March 22, 1941, contract 83142.

I have received other letters of intent; we were at the job ahead of that letter even; I know I got a contract—. When we do get that letter, we started to proceed with more speed, or full speed, as many men as we had available under [346-a] a particular contract; or laid out the plans to proceed. This was

(Testimony of Edward F. Zap.)

true even though the contract had not been formally entered.

When I said yesterday that the letter of intent is the green signal, I meant the go ahead signal to start on it and the paper work and the signing of the contract and the negotiations of the exact terms will come through later.

I believe I got a letter of intent prior to entering into contract number 11909 in September of 1942; it seems to me I got the letter of intent about a month before I signed the contract but I am not sure of it. It is very simple to determine this from the correspondence.

(At this juncture Government's Exhibit 57 was received in evidence and passed to the jury.)

The Witness: My best recollection of how long negotiations went on before signing this contract No. 11909 are that it must have been from May of 1942 until the date of its being signed in September. The subject matter of this contract is general research to elaborate more and apply those new flaps to all types of Naval aircraft.

After I got this letter of intent pertaining to this contract, we tried to line up the work, to plan for it, but at that time we did not have many people to work; everybody was busy on the Grumman. Before receiving the letter of intent, I believe I did some planning and Mr. McLauchlin did [346-b] some planning as it was more of less at McLauch-

(Testimony of Edward F. Zap.)

lin's request to me. He helped me to work out the proposal, to generalize on the program to include the thick air foil section. I could not tell how much time Mr. McLauchlan spent on it.

Q. How much time did you spend on it?

A. Oh, off and on, a day or two days. We were busy at the time.

I am not quite sure without looking up the records whether an actual start of this project was made until after we received the letter of intent. We did try to do some work on it but other urgent matters came up.

With reference to Government's Exhibit 37 in evidence, being check No. 384 and Government's Exhibit 30, concerning the item of $500, which I testified was presented to the Navy and paid, the check is numbered "15728-A," it says here. I did not see Government's Exhibit 30 in evidence.

Q. At any rate it was referred to on page 1401 and -2 of the transcript. The question was, "No, it is dated June 29, 1942, the invoice is dated."

The answer was, "This seems to be an invoice too."

But, at any rate, what I am driving at is the $500 item.

You went to some length yesterday to explain that this charge was for work done at the wind tunnel of the University of Washington and that you had paid $500 or more out of your pocket to pay students at the University of Washington and [346-c] for other expenses.

(Testimony of Edward F. Zap.)

A. The check seemed to indicate. It says "Reimbursement."

Q. I am not asking what the check says. I am asking what your recollection is now that that item was for.

A. Yes. For reimbursement of money I spent on some of the tunnel tests, or before.

Q. Now calling your attention to this Exhibit 30, and the sheet therein entitled "Schedule C," the item on Schedule C June 29, 1942, "Electric power in wind tunnel, $500." Does that refresh your recollection at all?

A. I have never seen that paper.

Q. You never saw it before? A. No.

Q. Turning to the next page, then, there is an invoice. A. Yes.

Q. Signed by yourself, is it not?

A. That is correct. That is my signature.

Q. Yes. Turning to the next page, there is another invoice? A. That is correct.

Q. Is that signed by yourself?

A. That is my signature.

Q. The first one being "Traveling expenses, Harold E. [346-d] Dale, to Washington, D. C., in the interests of contract NXs 4105," is that true?

A. Yes.

Q. That is signed by you and certified as correct. Now the next invoice is "Traveling expenses, Edward F. Zap, to Washington, D. C., in the interests of contract NXs 4105."

(Testimony of Edward F. Zap.)

The next one is "Traveling expenses of Harold E. Dale, chief engineer, and Marion Israel, chief of stress, to Washington, D. C." That is signed by yourself, too, is it not?

A. That is correct. That is my signature.

Q. And the next one is "Traveling expenses, W. M. McLauchlan and George Jue, to the University of Washington, Seattle, Washington, for the purpose of obtaining certain vital information pertaining to stress requirements under contract NXs 4105," and the total of that is $192, is it not?

A. Yes, that is correct.

Q. Yes, sir. And the next one is a charge to two round trip tickets from Los Angeles, California, to Seattle, for McLauchlan and Jue, and the total of that is $133.56, is it not? A. That is correct.

Q. Signed by you? [346-c]

A. Yes, sir, that is correct. That is my signature.

Q. The next one is "Check to Northrop Aircraft Company, for airline ticket to Washington, D. C., in the interests of contract NXs 4105," is that true?

A. That is my signature.

Q. The sum of $287.76? A. Yes, sir.

Q. The next one we come to is one dated May 8, 1942, it being an invoice which states as follows: "Reimbursement, E. F. Zap, for advance to power company for power used at University of Washington, Seattle, Washington, wind tunnel in ascertaining certain vital stress information in connection with item 1, lot 2, of contract NXs 4105." By pay-

(Testimony of Edward F. Zap.)

ing the power bill direct a substantial saving in wind tunnel charges is made. The amount is $500, certified correct and just, payment not received, "Edward F. Zap," signed. Is that your signature at the bottom? A. My signature, correct.

Q. Does that check, dated May 9, 1942, being Government's Exhibit 37, in evidence, check No. 384, refresh your recollection as being for the same charge that this voucher dated June 29, 1942, is for?

A. The description of both exhibits don't jibe. That is what I notice first. Here it says, "Reimbursement on tunnel test design information, job 252," on account $500," [346-f] It is dated May 9th. And here this says May 8th, and just as you read.

Q. Can you now tell us whether or not those two items are for the same charge? The check and the invoice?

A. I only can go on account of this date. It says "Reimbursement," so I am construing I was before that up at the wind tunnel and did some work up there.

Q. In connection with that item, Mr. Zap, do you remember last June, approximately June 15, 1942, having a conversation at your place of business with Mr. Hilton J. Byars and Mr. L. S. Minor concerning those specific charges?

A. Might be, but I can't recollect. I had several discussions.

(Testimony of Edward F. Zap.)

Q. Is it not true that you had such a discussion on or about June 15, 1942, at your office——

A. I can't recall.

Q. ——in West Los Angeles, California?

A. I can't recall if it was the 15th of June. I couldn't recollect.

Q. Approximately.

A. It might be, but I don't recollect.

Q. Your testimony is that you do not recollect?

A. Oh, I have seen Mr. Minor in my office probably as a total—I can't recollect taking the time in November, last [346-g] year, when business was regular—probably three times in my office. That is all I recollect. He might have been there when I was not there.

Q. Do you remember?

A. I saw Lieutenant Minor several times in his office.

Q. Yes. And did you see Mr. Hilton Byars there about that time?

A. I saw Mr. Hilton Byars there probably almost every week, to my recollection.

Q. Do you remember or do you not remember having a discussion with them concerning this particular $500 item? A. Not that I recollect.

Q. Now, is it not true, Mr. Zap, that on or about the 18th day of June, 1942, at your office in West Los Angeles, California, you personally stated to Hilton J. Byars that you had paid the power company the sum of $500 for power used in the wind tunnel tests at the University of Washington?

(Testimony of Edward F. Zap.)

A. I know now what you are referring to. May I explain?

The Court: Yes.

Q. By Mr. Maury: Please answer the question first. Is it true or is if not true that you had such a conversation and made such a statement?

A. No, I did not make such a statement.

Q. You did not make such a statement?

A. No, it was different. [346-h]

Q. So you wish to explain? A. Yes.

Q. Please explain.

A. I would like to make that statement as I explained.

Q. Well, explain.

A. Yes. I have always difficulty to talk to anyone which is not from our profession, aerodynamicists. Like the counsel, Mr. Binns, said, he had to have 50 times explained what the flap is, and he still don't understand it. So the same difficulty with Navy accountants, and my own accountant, to explain a tunnel procedure. I gave an explanation as I tried to explain it yesterday, what we did in the tunnel, and here is the result. On the check it says "Reimbursement on tunnel tests for design."

Q. I am not asking you what it says.

A. The bill says something else.

Q. Just a moment, Mr. Zap. I am not asking what it says. A. The bill says something else.

Q. Just a moment, Mr. Zap. I am asking what

(Testimony of Edward F. Zap.)

it says on the check. I am asking your recollection of that conversation.

A. I recollect some faintly now. I explained the procedure, what we are doing in the tunnel and how we are trying to save time and power, by which we mean manpower. Of course, [346-i] electric we call juice.

Q. Did you tell Mr. Hilton J. Byars that you meant manpower when you said "power"?

A. Well, Mister—no such thing.

Q. Did you tell him that at that time?

A. We told——

Mr. Lavine: Read the question back please. I don't think he——

(The question was read as follows: "Did you tell Mr. Hilton J. Byars that you meant manpower when you said 'power'?") [346-j]

The Witness: That is correct. That is what we mean.

Q. By Mr. Maury: Did you tell him so?

A. I can't recollect.

Q. You can't recollect. Now, is it not true, Mr. Zap, that you stated to Hilton J. Byars at that time and place that you had paid this money direct to the power company, I mean the $500, in order to effect a substantial saving in the charges made by the power company? A. No such thing.

Q. You made no such statement? A. No.

Q. Is it true or is it not true that you stated that if the University of Washington would bill for the

(Testimony of Edward F. Zap.)

power used, it would be at a higher rate to you than if the power company were paid direct?

A. That's a mixed up statement of a statement I made and explained the situation just like in those checks. I can show you what Mr. Byars or Mr. Minor writes on those things. It is "float struts" one day, and comes back——

The Court: Wait a minute now.

Q. By Mr. Maury: Now, can you show us what Mr. Byars or Lieutenant Minor wrote on those checks or papers?

The Witness: What is that?

The Court: Read the question.

(The question was read.)

The Witness: On what checks or papers?

[346-k]

Q. By Mr. Maury: I don't know. You just stated that you could show us what they wrote on checks and papers, and I am asking you.

A. Oh, yes. I can show you.

Q. Fine.

A. This is Mr. Byars'. This is one sample I found of them.

Q. What is that? Just have a seat.

A. It is a float strut. It is a strut——

Q. Just a minute, Mr. Zap, until we identify this.

The Clerk: You want that as Government's exhibit?

Mr. Maury: Next in order.

(Testimony of Edward F. Zap.)

The Clerk: That will be Government's Exhibit 58, for identification.

(The document referred to was marked as Government's Exhibit No. 58, for identification.)

Q. By Mr. Maury: Calling your attention to Government's Exhibit 58, for identification, Mr. Zap, is that one of the sheets that Mr. Byars made out? A. That is what it is.

Q. Is that one of those C.A.S. 5 or 5-A forms?

A. Yes. Signed by Mr. Hilton Byars. Correct.

Q. Yes, sir. Let me see it. Was this particular——

A. Submitted originally "struts". Then it is "street".

Q. One of these is not a carbon copy of the other. By "strut" or "street" what do you mean?

A. A strut is a strut. [346-1]

Q. Well, that is what is typewritten in here, "floating struts."

A. But submitted as "floating street."

Q. Yes.

A. And came back as a "floating stress."

Q. Yes. It came back from where?

A. And there are many of those things.

Q. You say Mr. Hilton Byars had a discussion with you about this $500 item and made out one of these? A. What was the question now?

Mr. Maury: Repeat the question, Mr. Reporter.

(The question was read.)

(Testimony of Edward F. Zap.)

The Witness: I don't recollect if he made one out. I usually didn't see those things. I never saw a C-4 or C-5's form. I dug them up in the last week. I only saw the invoice coming to me, that is all.

Q. By Mr. Maury: You saw the invoice. Did you read it before you signed it?

A. No; because I know it has been prepared by our staff, it was checked by the Navy auditors, and this is just a matter of a form. I glance at that, $500, wind tunnel test, sign it and there it goes. It has been checked by almost six or nine auditors, so I had to assume it's correct.

Q. Isn't it true, Mr. Zap, Mr. Byars questioned that item and had that conversation with you concerning it which I have described? [346-m]

A. Mr. Byars sitting out there?

Q. Yes, sir.

A. I don't recall that. Just the reverse. I asked Mr. Byars every time I saw him, in my place, "Mr. Byars, is everything in order?"

Q. Now, just let us get down to earth. Did you or did you not have this conversation with Mr. Hilton Byars on or about the 15th of June, 1942, concerning the $500 item which is before you?

A. I can't recollect.

Q. I see. Calling your attention now to Government's Exhibit 8 in evidence, a letter from the University of Washington, did you receive that letter?

The Court: What is the date?

(Testimony of Edward F. Zap.)

Mr. Maury: The date of the letter is August 25, 1942.

The Witness: Yes, I have seen that letter.

Q. By Mr. Maury: Does it refresh your recollection at all in connection with the trip of July 15th, or thereabouts?

A. Apparently that states here the report number——

The Court: Just a minute. Just does that refresh in any way your recollection now in connection with the check for $1,000, Government's Exhibit 37? That is the only question.

The Witness: I think so, if I am allowed to look a little closer.

The Court: That is right. Take all the time you want. [346-n]

The Witness: Report 178, 183, 188, 189, 190. It is very simple to check up. We have copies of those reports. If I don't have them here, then Commander Smith has them. And that shows clearly what has been done and where it belongs to. To designate from that report or from my memory as to which report belongs to which job, most of it here, roughly almost everything, belongs to the Grumman.

Q. By Mr. Maury: Calling your attention to Government's Exhibit 58, for identification, Mr. Zap, is that one of the sheets that Mr. Byars made out? A. That is what it is.

Q. Is that one of those C.A.S. 5 or 5-A forms?

A. Yes. Signed by Mr. Hilton Byars. Correct.

(Testimony of Edward F. Zap.)

Q. Yes, sir. Let me see it. Was this particular——

A. Submitted originally "struts." Then it is "streets." [346-o].

As to report 154-B, without seeing the report, I don't know what it contains. Those pencil figures in the margin of Exhibit 8 are in my handwriting. Opposite the report 154-B, on the righthand side, those figures 082U designate, as I want to explain, that I have not seen that letter until somewhere around when we flight tested, which would be late in September, and those notations are the beginning of allocating the time to the various jobs. Those are my notations on it; it then goes up in the aerodynamics department; McLauchlan digs up the reports, and Mr. Bowers, his assistant, and checks these things, and he sends that back to me and verifies if those reports fit in these notations I am putting on here. And that was never finished. You see, I never got that back, because then the cyclone came and destroyed all these things.

It was my idea at the time I saw that the pencil figures in the righthand margin 082U after report No. 154-B, would signify that this work indicated under that report was then on the 0821. I sent it as a question mark up to the aerodynamics department to give me a complete report on it.

The letters 08 in the margin opposite report No. 173 also mean 082U. The same is true as to the pencil letters 0.8 as to report 177.

(Testimony of Edward F. Zap.)

As to report 178, the letters GR in the righthand margin indicate Grumman or contract NXs 4105. The letters [346-p] GR on the righthand side as to 183 also indicate Grumman.

I want to state before I checked up those things it was my attorney at the time it belongs to the Grumman, because around that time this tunnel test was, also roughly stating, mostly done in July, as page 2 of the Exhibit indicates May and July. It was my idea when I made these pencil notations that everything on page 2 pertained to the Grumman which is contract NXs 4105. I want it understood it was a suggestion of me to the aerodynamics department to check up and give me a report on it.

I believe I have seen Government's Exhibit 16 in evidence before because that is my handwriting on the bottom of the second page, or the carbon copy.

I don't remember what the figures "3-0" at the top of the column to the left in my handwriting mean.

This 26-0 seems to be the general account. I am not sure. It seems to be the allocation account or something. I had a meeting about it with somebody: with Champlin, probably, or with McLauchlain: it might have been with Browne. Rather Browne, because it was Browne's job to enter these things and pay—and wheedle it out with Champlin. I would

(Testimony of Edward F. Zap.)

not say that these were my directions to him how to enter the figures.

Q. What were they then?

A. The same indicates here. He talked about it [346-q] probably. He asked me "Can you remember this?" and I always had trouble with those bills. They sent me bills after half a year and we couldn't untangle the situation, which is which. In the correspondence I can show you we had continuously a squabble with the University: "break these things up, each report with the date on it, and how much it cost."

I believe, again guessing, you can trace back in the correspondence file of the wind tunnel that we wrote back "break that bill up." Let's see the date. August 28th. It looks like this came first and this came second, according to the date.

I do not recollect whether I made the apparent erasure in the left hand margin of Exhibit 8, next to the column designated "Report No. 177."

Q. Can you look at the figures?

A. I haven't seen these things since it was taken away from me.

Q. Surely, surely. Can you look at the figures that are apparently erased and tell whether they were made by you?

A. I can't see that very good. Can you tell me what it means?

Q. I am asking you, Mr. Zap.

(Testimony of Edward F. Zap.)

A. I can't see these things very clear. I can't make that out.

Q. You can't make it out? A. No. [346-1]

Q. I observe also that there are erasures on the other document, right in the center of the page here. Can you make these out?

A. I can make out one 5. That seems to be a pencil erasure.

Q. Yes.

A. I can make out a 5 here, then a 6. This other one is just floating all over the place.

Q. Well, let us go back to the other exhibit now, the longer letter, that is 8, in evidence. Calling your attention to these pencil notations in the left hand margin, are those in your handwriting also?

A. Yes, they are in my handwriting.

Q. Mr. Zap, did you ever pay the Puget Sound Light Company any money whatsoever on account of power used at the wind tunnel of the University of Washington?

A. I did not ever pay any power company in Seattle, Washington, any sum of money whatsoever on account of power used at the wind tunnel of the University of Washington, except that on a few occasions when we wanted to work at night, it was necessary to pay extra to have a "standby man" on at the power company in order to sell us the power peak when it was available. This was still charged to the University and we still paid it later on, but that was, I may say, "black market" so to speak.

[346-2]

(Testimony of Edward F. Zap.)

Q. You short-circuited the University then, to the tune of about ten or twenty dollars?

A. That's right, but this money was not paid to the power company, or to any power company to my recollection at any time.

The Witness: I heard Mr. Dwinnell testify a week or so ago; I met him every time I was up at the University of Washington.

Q. Do you remember the conversation he testified to in which you were said to have asked him for certain letterheads of the University of Washington in blank?

A. There were no letterheads.

Q. Do you remember the conversation?

A. Not very clearly. I remember something, asking him to split up reports, because they gave us two or three reports in one report form, and that wasn't useable to us, because we couldn't send it in to the Navy that way, because some of the work was done on one airplane, other work on another airplane, the third work was a general report to the aerodynamic department of the Bureau. It has to be broken up in each individual report.

Q. Well, do you or do you not remember at the University of Washington you asking Mr. Dwinnell for some blank letterheads of the University of Washington?

A. No, I don't remember. What should I do with [346-1] letterheads?

(Testimony of Edward F. Zap.)

Q. I ask that that be left to the jury and stricken from the record, your Honor.

The Court: We cannot both leave it to the jury and strike it from the record. Let it be just one or the other.

Mr. Lavine: I submit we should leave it to the jury.

The Witness: I don't remember in that conversation that I told Mr. Dwinnell that some of those projects were my own private work; that is a misunderstanding. I can clear that up. I do remember a conversation concerning splitting up these reports faintly, because we had that trouble. To explain a little bit on that, you see if you check up on those various reports, on the dates, you will find we were in the wind tunnel, say in February; the report from the wind tunnel came in May or June. That is not satisfactory. So if you further check up you will find gradually we took the reporting over by ourselves, in order to get reports faster. And that's all I can recollect.

By the Witness: I heard Mr. Magill testify this morning that the fee I was to pay Mr. McAvoy for the flight test was approximately $2500. The exact amount Mr. McAvoy and I agreed on for those flight tests—again I must say I don't recall correctly. It is only what I faintly recollect. Basically what was agreed on is that the Government test is run by McAvoy for $2,000 or $2,075, which is the [346-u] standard Navy test, and any addition to it has to be

(Testimony of Edward F. Zap.)

paid extra; of course, all expenses included, his insurance included, and so on.

Referring to this, in lieu of Exhibit 3, namely the letter of January 29, 1942, this is over my signature and it is addressed to the resident inspector of Naval aircraft.

Mr. Magill *and figured* out those figures before we put them down. My recollection is we figured it out, with Mr. Magill, and Mr. Harold Dale was involved in that too, because I checked it up last week, and you see there is H. D., Harold Dale, and L. H., which means Leona Hanley has written the letter. So from that I conclude that Harold Dale dictated [346-v] that letter and Mrs. Leona Hanley wrote the letter, and I signed it. This is a proposal, and I go a little closer than before I send it in, naturally, yes. This is a proposal to the Bureau.

At that time I knew that I had agreed with Mr. McAvoy to pay his about $2,000 or $2,500. I don't recollect how much I planned to pay for insurance at that time. I know that from a previous flight test it runs about $1,000 to $1,500. It is flexible from one year to another one. It depends upon which underwriter you touch or you ask for and how he figures back in New York, and what kind of a quotation he gives you; how much you tell him has to be flown. That is very flexible.

Q. When you quoted to the Government, Item A, "Chief Test Pilot's fee and insurance," what insurance did that include?

(Testimony of Edward F. Zap.)

The Witness: All that insurance. May I explain this thing? In Item A in this exhibit, entitled "Chief test pilot's fee and insurance," I included or contemplated all insurance which is on my side, to protect myself and my employees, in case the airplane crashes in the field or falls on top of a house and I have to rebuild the house.

Now, in item B where it is listed "flight engineer's fee and insurance, $650," that insurance is for the flight engineer. I want to call attention that is a special insurance, because he takes a hazard in the first flights. [347]. The test pilot takes a hazard. I bought his insurance. I contemplated his insurance in this item A. Other insurance I contemplated in item A are six types of insurance. If it is the ground coverage for my protection, then it is not—no—then it is in the thing. If government ground protection, then it is not.

Q. And is the public liability and property damage insurance included in this item A?

The Witness: My own public liability, not the Government's public liability for my using their plane—but my own public liability and property damage insurance—that it belongs in that group, in my opinion—in item A.

Q. Now crash insurance, you say, was discontinued after Pearl Harbor?

A. To my best recollection I think there were two insurances discontinued. It is all in the correspondence.

Q. Was that included in item A also?

(Testimony of Edward F. Zap.)

A. Distinctly I remember the crash insurance was cancelled. There is an item G, crash insurance. I am quite sure this is a government protection, and that was cancelled. It says here "H. Ground coverage insurance, 30 days." I don't know right now if this is just government insurance or mine.

You see, all these matters, Mr. Champlin is supposed to attend to, and had all the correspondence for it.

Mr. Maury: I am talking now about that exhibit [348] before you, the quotation to the Government for the flight test, and I am asking you for your explanation as to those items other than item A wherein insurance is mentioned as part of the quotation.

The Witness: It says here "G. Crash insurance," which was cancelled. The amount of that crash insurance is $4,200. Mr. Magill and I, all three worked out, and that I sent to the Government. As I recollect, we got an answer to that letter very, very late, I believe. I haven't seen it, or maybe I glanced at it. I don't recollect correctly. I know for months we didn't get any answer.

This morning, I testified concerning certain expenses for insurance. The liability insurance in my business for injuries to employees is contemplated in that statement before me.

In my opinion that belongs in the pilot's fee and insurance. That is my protection when somebody gets hurt by a propeller, one of the employees work-

(Testimony of Edward F. Zap.)

ing around an airplane, and I have got to be protected.

Q. Now, is "workmen's compensation on all employees unless flying" included in that item A or any other item?

A. Well, I don't know. You see, these insurance matters, they were cooked out—I cannot make a statement where this thing belongs to. I don't dare to make any statement. I don't know much about that matter.

Q. You testified this morning that on August 27, 1942, [349] you took out an Aetna accident policy upon Mr. Dale while flying, and that the cost of it was $250. Is that included in item A there?

A. There were two insurances taken out for Mr. Dale.

Q. Now please answer that question. Is it or is it not included in item A?

The Witness: Will you read that question once more?

(The question was read.)

The Witness: I don't think so. May I explain?

Q. By Mr. Maury: You testified this morning that you took out a $10,000 policy on McAvoy, and that the cost of it was $135 for ten hours. Is that included in the item A? A. That is correct.

Q. Now you testified this morning that on August 25, 1942, you took out a workmen's compensation on aircraft employees in flying, at a cost of $251. Is that included in that item?

(Testimony of Edward F. Zap.)

A. I am a little vague on this workmen's compensation but I believe it belongs in that.

Q. In item A? A. In item A.

Q. Now you testified this morning that on August 25, 1942, there was a rider issued concerning crash insurance, which was later cancelled, that this was government insurance. Was that included in item A?

A. If it refers to the crash insurance, item G, it is [349-a] not. The best as I remember, it was cancelled.

Q. Now you testified this morning that on August 20, 1942, you took out a comprehensive insurance policy on airplane QS2U in the sum of $80,000, that the policy was for ground coverage only, and that the premium was $560. Was that included in item A? A. I think so.

Q. You testified this morning that you had also taken out a public liability and property damage policy protecting the public against your liability to the extent of $100,000 and $50,000 for property damage. Was that included in that item A?

A. I think so.

The Witness: In other words, then, in item A, which reads $4,000, all insurance was covered except the insurance on Dale and the crash insurance. And that was my estimate of the cost of the insurance plus the test pilot's fee as of the date which that quotation bears, plus the expenses for the pilot, to bring him to the place and get him back, plus his expenses, hotels and meals and incidentals.

(Testimony of Edward F. Zap.)

I paid Mr. McAvoy altogether for his services, $2,075 in a check, $300 cash, $200 in a check, and I believe $50 in petty cash. I can't recollect clearly whether those checks were drawn on my business account or my personal account. [349-b] I believe I wrote them on my personal account.

I am not sure that this check No. 2679 to William H. McAvoy, in the sum of $4,000, being Government's Exhibit 7, in evidence, is the check that I used to pay Mr. McAvoy, but I believe I paid that on a Bank of America check. I can't recollect what I wrote. It was very exciting times, and I can't—Mr. McAvoy just signed that check, endorsed it, and that's all he did with it—you see—for your own record.

Calling my attention to Government's Exhibit 19 in evidence, and to the last page thereof, the signature looks like mine.

Q. Did you write it?

A. It looks like my signature, so I must have, but I want to call attention it looks strange to me, that paper.

Q. That paper looks strange?

A. This paper is what we're using in the stress reports. That is not our standard paper which we use for any kind of work.

Q. But it did come from your office.

Calling your attention to the document next before that in the same exhibit, is that your signature? A. This is my signature.

(Testimony of Edward F. Zap.)

Q. Calling your attention to the document next before that, is that your signature?

A. Yes, this is my signature.

Q. And to the back of the document next before that, [350] are those your signatures in two places?

A. Those are my signatures.

Q. Calling your attention to the front of the document, is that your signature?

A. Yes, this is my signature. May I see that? This is definitely paper we use in the stress department.

Q. That is indicating the last sheet in the exhibit?

A. The last sheet. Which I usually, when I go on a trip, sign ahead of time for the stress department to fill its reports and send anything back to Washington.

Q. Do you wish to testify now that you did so sign that before it was filled in?

A. There is another thing that appears to me, October 13th. Any certification I made in the middle of summer was notarized by a notary public. We established a notary public right in our office. And that is missing on the document.

Q. But do you wish to testify that you did or did not sign it before it was typed in?

A. Well, I merely report the facts as they appear to me.

Q. Yes.

A. It looks like my signature, and I suspect that

(Testimony of Edward F. Zap.)

that signature was put on that paper for the stress department and somebody has used that paper.

Q. You suspect that? A. I suspect it. [351]

Q. Now that is your testimony.

Now calling your attention to this document immediately prior to that one, what is your testimony concerning that? The invoice to the Navy?

A. That is my signature; a standard invoice which was given to me for signature, and I signed.

Q. A standard invoice? A. Yes.

Q. On the date on which it bears?

A. What was that?

Q. On the date on which it bears, October 16, 1942? A. October 16, that is correct.

Q. How much did you expend on McAvoy's expenses while at Daggett?

The Witness: Will you read that to me please?

(The question was read.)

The Witness: The Daggett trip was a special thing which was arranged on account of weather conditions.

Q. By Mr. Maury: Now just let us go back and get down to earth.

A. All right.

Q. How much money did you spend on Mr. McAvoy's expenses while at Daggett?

A. I can't recollect how much. Everybody up there was on my private money.

Q. On your private money? [352]

A. That is right, and I paid the hotel bills. I

(Testimony of Edward F. Zap.)

paid the meals, I paid everything. I bought straw hats. I even brought a doctor there because they were sick.

Q. But you don't recollect how much Mr. McAvoy's hotel bill was?

A. I can't recollect.

Q. Did you have anyone there to keep accounts?

A. In charge was Harold Dale, and we had a bulletin which designated each number, what kind of a duty he has; timekeeper, weight keeper, and so on; and it was their duty to keep track of how many men are up there and how long they are up there. Besides the time cards were down at the office and it was noted, or supposed to be noted on where they are.

Q. I see. Was anyone designated to keep track of the expenses there?

A. That was Mr. Harold Dale's duty.

Q. Mr. Dale's duty. Did he handle any money?

A. I mean for the time when he was up there.

Q. Oh, for the time?

A. Because he selected the people.

Q. Was anybody designated to keep track of the actual money that was spent and what it went for?

A. The money I spent.

Q. Did you keep track of it?

A. The best I could [352-a]

Q. Did you make any written memorandum of what you spent and on what?

A. We did a little. I got to explain the circumstances.

(Testimony of Edward F. Zap.)

Q. Please do.

A. We had been up there in the camp of Douglas, there is a mess hall up there and we received meal tickets from the Douglas, which was charged to me when we ate at the field up there. Evenings when we came in we'd eat at the hotel, and that was charged to me. Incidentals and so on I just paid out of my pocket. That is all I can recollect.

Q. But kept no accurate account of it?

A. No, I was too busy.

Q. How much were you repaid by the Government for that trip, if you recollect?

A. I saw it last week here.

Q. Anyway in that was a certificate for McAvoy's expenses, was there not?

A. If you show me the document—it probably was.

Q. Here is a document which you testified you signed, which is Government's Exhibit 19 in evidence. A. Yes, that is correct—McAvoy.

Q. You received that money for McAvoy's expenses? A. That is correct. That is correct.

Q. That is over and above the $4,300 which you received by virtue of public voucher No. 36062 in the same [352-b] exhibit?

A. That is correct. That is the expenses we paid in Daggett. It is McAvoy's—was in the total sum—it is in the report, I think, 21 or 25 days, or something like that, and 10 days we spent up there. It

(Testimony of Edward F. Zap.)

was a special assignment. The Bureau sent us up there.

Q. And it was under this letter, Exhibit 3, which is a duplicate of 49 for identification, the letter of January 9, 1942, was it not?

A. No, I feel like this was something in addition: the Government told us to go up there; it was not anticipated, it was extra, and I feel like I am entitled to be paid extra for time.

Q. Was it flight testing a Vought-Sikorski plane on this trip? I withdraw that. On this trip to Daggett you did test a Vought-Sikorski plane in flight test, did you not? A. That is correct.

Q. And William H. McAvoy performed the flight test? A. That is correct.

Q. In accordance with regulations?

A. That is correct.

Q. Mr. Dale accompanied him as engineer?

A. That is correct.

Q. Then did, or did not, this trip to Daggett follow as the result of the letter of January 29, 1942? [352-c]

A. I didn't get the meaning of the whole question. Will you repeat it?

Mr. Maury: Read him the question, Mr. Reporter.

(The question was read.)

The Witness: No, it did not. It was not contemplated.

Q. By Mr. Maury: When you say you think

(Testimony of Edward F. Zap.)

this flight test was something extra, what do you mean, please?

A. When we made the estimate of that price, why, we anticipated going to fly it in the Los Angeles area, and it says so in the letter. No, I am in error. It must have been another letter—Los Angeles area—because if we are sent somewhere else that is extra.

Q. Then the $1260 was the extra over and above the amount set forth in that letter, is that true?

A. Pardon me. Here I am correct again. It says here, "tests outlined in Enclosure (A) will involve approximately 15-20 flight testing hours in Los Angeles area."

Q. Then the $1260 was additional, over and above?

A. That is what I am entitled to because I was sent up there 180 miles away; we had to get trucks, and trailer equipment and everything had to be transported up there.

Q. Did you discuss that——

A. We actually spent 12 days up there and had to go up.

Q. Just a moment. Did you discuss with Naval officers [352-d] or officials before you went?

A. I was ordered to do that.

Q. Who ordered you?

A. From the Bureau came an order, "move to Daggett Field."

Q. Now, the whole flight test then was the result

(Testimony of Edward F. Zap.)

of this letter of January 29, 1942, with the additional fact that you were ordered to move to Daggett Field because of weather conditions at Hughes Field? A. That is correct.

Q. Did you receive an answer to that letter of January 29, 1942?

A. I think there was one; I don't recall it.

Q. I call your attention to Government's Exhibit 3 in evidence, being a letter dated June 29, 1942. Can you tell us whether that is, or is not, the answer to the letter of January, 1942?

Mr. Lavine: I object to that, the letter is the best evidence.

The Court: Yes, the letter speaks for itself.

The Witness: That is what it says here. [352-c]

Q. By Mr. Maury: That is what it says there? Did you receive that letter?

A. I am looking at my initials. Mostly what I read I initial. It doesn't seem to have my initials.

Q. Did you or did you not receive a letter dated June 29, 1942?

The Witness: I think so. The office probably received that, and that's all. The duty is when such things come in it is attached to it, and it was the duty of Harry Champlin to keep track of it, and go through the whole thing and watch the procedure. Mr. Champlin and Mr. Browne's duty is to inform us and comb these things before it is turned over with the Navy, in case there is a question to confer

(Testimony of Edward F. Zap.)

with the Navy auditing people and cook the situation out.

You must realize we are finishing our own baby, and we were having letters, everybody watching it, finishing, we received telegrams daily, "When do you fly? What is the date," everybody watching the birth of that new baby. So we went through the whole procedure as Navy specifications prescribe it. I didn't wait for any letters. We were anxious to get it out to the field, and the moment it was finished, that work—I believe the last day before we got it out we worked two or three nights throughout. I was myself there in the factory, stayed at night time there to get it out; we pulled that airplane out almost somewhere [353] around 4:00 o'clock in the morning to Hughes Field. The pilots all were prearranged, we just wanted it to fly, and it is up to the naval inspector because there are certain requirements before you can fly, some kind of a report, a balance report, has to be handed to the Navy inspector before we are released to take the airplane over and fly with it.

Originally in the contract 83142 there was no provision for a flight test.

Q. By Mr. Maury: Mr. Zap, in the claim against the Government for $4300, did you include the $200 for Harold Dale to fly back to Anacosta?

A. In the $4300?

Q. Yes, sir.

A. Please, I want to mention there are two

(Testimony of Edward F. Zap.)

claims, four thousand and three hundred extra. And the $200 for Mr. Dale to fly to Anacosta is included in this four thousand.

Q. In the four-thousand? A. Yes, sir.

Q Is it set forth anywhere in that claim?

A. Chief test pilot fee and insurance. You see, McAvoy left and Dale had to continue flying test flights. We still test flight that airplane to Anacosta. The Navy was anxious to get that airplane back to Anacosta and us to continue making changes.

[353-a]

Q. Now, calling your attention to this Government's Exhibit 19 in evidence, which contains Voucher No. 26062, is that the claim for $4300?

A. Yes, it says so here.

Q. Yes. A. $4300.

Q. That is backed up by the invoice for $4300?

A. Correct.

Q. And the statement of $4000 has been paid to William McAvoy? A. Yes, it says here so.

This isn't necessary, in my opinion, at all. (Referring [353-b] to the last sheet.)

Q. That is the last sheet?

A. That last sheet is not necessary. Some mystery to me why that sheet is in there at all.

Q. Calling your attention to this invoice, that is the one for $4300, is it?

A. Yes, it says, "As per list Z-73. 4300," because I looked it up. When you look at the list Z-73 you

(Testimony of Edward F. Zap.)

find there is 4300 for extra flights, that means according to——

Q. Where is that list Z-73?

A. You must have that.

Q. You looked it up.

A. Oh, wait a minute. I can get it?

Q. Please do.

(Witness leaves the stand.)

A. That particular list is missing in here.

Q. In your papers?

A. Yes, sir. This is what I received last week. It is not in my papers.

The Court: Take the stand.

Q. By Mr. Maury: When did you look up list Z-73?

A. I am a little confused now. I don't know if I ever seen it, or did I see it? I don't know now.

Q. You mentioned a moment ago seeing it. Let's get the matter quite straight. You think back and tell us what your recollection is concerning this Z-73. [354]

A. I probably have been concluding myself I have seen somewhere two figures, 4300, and I believe I have just constructed that it is probably in that list.

Q. Calling your attention, Mr. Zap, to Government's Exhibit 5 and 6 in evidence, do these refresh your recollection at all as to the two separate figures of four thousand dollars and three hundred, which you just mentioned?

(Testimony of Edward F. Zap.)

A. Well, let me examine for a minute what it relates to. This is written by Mr. McAvoy. That is in his handwriting.

Q. Surely. I will hand it to you.

A. I believe so.

Q. Yes.

A. I can't recollect the things. This is my signature on it.

Q. That has your signature on it?

A. Here, yes.

Q. What are the figures 3-15 beside your signature? Is that in your handwriting, those figures?

A. It looks like my handwriting.

Q. What does it indicate?

A. Flight test 3-15.

Q. What does the 3-15 mean?

A. As I recall the second detached here means various items in the contract, Item 1, Item 2, Item 3, and so on down the line. [355]

Q. 15 items? And what does that pertain to?

A. It must refer to flight tests.

Q. 3-15 refers to flight tests? You mean on the books of your concern? Is that the account number?

A. Probably that is what it is.

Q. Do you know, of your own knowledge, whether the account number of the flight test under 83142 was designated 3-15 on the books of the Zap Aeronautical Engineers?

A. I am not sure about that.

(Testimony of Edward F. Zap.)

I don't know any of the account numbers. There were hundreds of account numbers on my books.

I cannot tell you what account number 215 was. I cannot tell you what account number 252 was. I couldn't say what account number 262 was. I cannot tell what account number 263 was. I only recollect those 26's meant Grumman. They were Grummans.

Q. How about the 3's?

A. The 3's, OS, 83142, in the beginning has a 3 on it.

Q. And 3-15 was the flight test? A. Yes.

Q. Was that the lowest or the largest number of the accounts on the Vought-Sikorski?

A. I don't get the question.

Q. Was that the largest numerical number of the accounts [356] pertaining to the Vought-Sikorski?

A. I couldn't tell for sure.

Q. Can you tell by examining the books?

A. In these books here?

Q. Yes.

A. I don't know anything about those books.

Q. You don't know anything about those books?

A. No.

I cannot tell anything by examining the books. I don't know anything about those books. I saw them laying around and growing and adding to it. I sat at the safe where they were taken out daily and put in there. Miss Boyle and Mr. Browne and Mr. Champlin put them in there. I never looked inside the books to my recollection. I asked for statements of the condition of my concern. I got statements from Mr. Browne, the certified public accountant; he made

(Testimony of Edward F. Zap.)

monthly statements, and that is the one I looked at.

I watched Mr. Champlin's and Mr. Hanley's time cards. And there was one more fellow there was under suspicion. [356-a] I can't—just a minute—yes, it is one more employee—Lewis Strauss, was in my mind under suspicion of cheating time.

The Clerk: This is VV into evidence.

(The document referred to was received in evidence and marked DEFENDANT'S EXHIBIT VV.)

Mr. Lavine:

"Request flight tests Zap OS2U be made as previously outlined and approved."

And then the next letter, it is a request letter and reads as follows:

"Contract 83142. Request this office be advised of valuation to be placed on OS2U-2 Serial 3075 in order that contractor may insure airplane for crash."

Then follows a cancellation of the crash insurance, public liability and property damage will be maintained by contractor.

"Your 15 KOS airplane has not flown. Weather permitting first flight will be made Saturday, 19 September."

"Contract 83142. Fault conditions this area holding up preliminary demonstration OS2U airplane. Unless advised to the contrary this

(Testimony of Edward F. Zap.)

plane will be moved to desert field at Daggett, California, approximately 100 miles northeast Los Angeles."

And then here is one dated September 21, 1942:

"OS2U-2 airplane moved to Highes Field zero seven [357] hundred this date. Provided weight and balance report delivered to inspector airplane will make first flight fifteen hundred this date."

And then follows a teletype from Daggett Field, on Navy teletype, dated September 30, 1942.

"OS2U-2 flight performance of 29 September, 1942. Flight No. 14—10 minutes—aileron stick for test with bunges on different mechanism. Number 15—thirteen minutes aileron stick for test with additional bunges. Number 16—twelve minutes, aileron stick for test removing bunges and adding aileron balance weights 3.4 pounds each side.

"Number 17—twenty-one minutes, rolling moment test, removing aft aileron cover plate. Number 18—nineteen minutes, aileron stick for test, removing forward aileron cover PAXX plate and setting aileron vane to 45 degrees. Number 19—seventeen minutes, aileron stick for test with addition of holes in upper surface of aileron."

And then the document goes on with a number of other technical reports signed "Carlin."

(Testimony of Edward F. Zap.)

The Witness: In connection with the other items of the flight test, outside of this $4,300, I have not received any payment from the United States Navy, to my recollection. I am speaking of payment of fees now. I have not received any payment fees in connection with the—I am sure, outside of [358] the $1909 I have testified to here by some auditor, I have not received any payment of any fees for that; the balance of the expenses for the work in the wind tunnel at the University of Washington. I don't think so, and I am doubting that I received the $1900. It has been audited, probably a voucher written out, but I did not receive the money. I am quite sure.

MURRAY B. MYERSON,

recalled as a witness on behalf of the plaintiff in rebuttal, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Binns:

I am a Special Agent of the F.B.I., Los Angeles. I am an accountant and have been about 20 years.

Q. Mr. Myerson, can you come down here and look at the books and records of Mr. Edward F. Zap in the account entitled 3-15 and tell us if that account indicates that any sums of money were given to Harold E. Dale for expenses?

(Testimony of Murray B. Myerson.)

The Court: I suppose you mean "paid," and not "Given."

The Witness: Exhibit No. 41, on page 1 of account No. 3-15, shows an entry opposite the date September 8th, "Harold E. Dale, flight test," under "direct charges"; and under the sub-heading of "other charges," "$250." [359]

Q. By Mr. Binns: Will you trace that check into the check register, please, Mr. Myerson?

A. Yes, sir. The check register, Exhibit 38, for identification, shows the entry, on page CR 55, under the date September 8th, check No. 2601, in the amount of $250, payable to Harold E. Dale; and under the "distribution" column, charged to account No. 3-15, $250.

Q. Will you give me the date of that check again, Mr. Myerson?

A. The entry appears under date of September 8th.

Q. Now, then, can you discover, Mr. Myerson, any other checks given to Mr. Dale for expenses?

A. In Exhibit 38 for identification, on page CR 58, and under date of October 9th, a $200 item, payable to H. E. Dale; charged on the distribution side to account 3-15. In that account 3-15, in Government's Exhibit 41, page 1, under date of October 9th, there is an entry to H. E. Dale, $200, charged under "direct charges," and the sub-heading of "other charges." The number of that check is 2701. That is the check to which that entry refers.

(Testimony of Murray B. Myerson.)

Mr. Binns: I ask that this check which has been withdrawn from Government's Exhibit 37, dated October 9, 1942, in the sum of $200, drawn to Harold E. Dale, be admitted in evidence.

The Clerk: Government's Exhibit 37, into evidence.

(The document referred to was marked as Government's Exhibit No. 37, and was received in evidence.) [360]

Q. By Mr. Binns: Mr. Myerson, I show you this check No. 2741, and ask you is that check entered on the books and records of Edward F. Zap?

The Witness: Exhibit 38, for identification, on page CR 59, there is an entry of a check for $643, No. 2741, payable to Harry Kem Company, $643, and charged to account 56, which is the accounts payable account in the general ledger. Exhibit 39, under account 56, shows an entry, under date of October 31, 1942, for $6,951.12, in which the amount of $643 is included. That sum is posted from the accounts payable in invoice record, page 10, in Government's Exhibit 38, shows that on September 30, $251 was charged to account 3-1, which is the unexpired insurance account in the general ledger, in Exhibit 39; and on the same date the sum of $392 was charged to account 3-0, which is shown in Exhibit 41 as the clearance account under our contract 83142.

Mr. Lavine: To which we object under our general objections heretofore made, your Honor.

(Testimony of Murray B. Myerson.)

The Court: It is so understood.

The Clerk: That is check 2741, into evidence.

(The document referred to was marked as Government's Exhibit No. 37, and was received in evidence.)

Cross Examination

By Mr. Lavine:

Q. Mr. Myerson, you didn't give us all the items that you found in Mr. Dale's accounts, did you?

[361]

A. I didn't get through before I was asked another question.

Q. Well, as a matter of fact, there was $200 sent to Mr. Dale on October 30, 1942, wasn't there?

A. I notice an entry in the—I can't tell you whether the books indicate that. There is an entry under date of October 30th which is not complete in one of the books, although it appears to be posted under his name in another book.

(Witness excused)

Mr. Lavine: We at this time offer in evidence a receipt for $200 sent to Harold E. Dale in Washington, D. C., October 30, 1942, and $2.89, cost of wire, signed by Ethel Boyle, the bookkeeper. We offer that in evidence for the defendant.

The Court: Admitted.

The Clerk: That will be Defendant's Exhibit ZZ.

(The document referred to was marked as Defendant's Exhibit ZZ, and was received in evidence.) [362]

(The following proceedings were had outside the hearing of the jury:)

Mr. Maury: In this matter, your Honor, throughout we have endeavored to be mindful of any possible record on appeal and of the voluminousness thereof, and, if possible, probably I can omit the offer as to Exhibits 34 to 45, for identification, into evidence in themselves and in full. The record is replete with quotations therefrom.

The Court: I notice that.

Mr. Maury: And yet, in order not to prejudice the Government's position, I ask counsel for a stipulation that throughout the course of the argument either side may refer to said books and quote or state therefrom, to the same effect and to the same extent as though they were in evidence, and that they may be deemed in evidence for that purpose without putting them formally into the exhibits and without offering them in evidence.

Mr. Lavine: Well, Mr. Maury, frankly I am afraid if I enter into that stipulation I am waiving the right that I have sought so zealously to protect, because we feel that any use of any material gained or gathered out of any matters illegally searched and seized are in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

It has been my position right along that since those documents were illegally taken, that, therefore, any evidence [363] coming from them is illegal and should be suppressed. And I cannot, for the sake of convenience——

The Court: Well, you can certainly reserve that objection if the Government agrees to it.

Mr. Maury: Why, certainly, it is agreed that the objection may, of course, be reserved. I wouldn't in any wise ask counsel to stipulate away any client's rights.

The Court: If counsel agrees to the stipulation suggested by the Government it is understood that the counsel has in no way waived his right, as he has heretofore stated in the record, of the illegal search and seizure, and upon that basis that none of this evidence should be admitted.

I don't know what those in there for, but you are free to refer to them and read them.

Mr. Lavine: I have been trying to revolve this thing in my mind hurriedly here, but I don't see how I can enter into a stipulation with reservations. If the Court should overrule my objections to your use of them, then, of course, there is nothing I can do about it; but I don't see how I can do one thing in one breath and at the same time reserve the objection or the rights that I have so steadily tried to preserve here. I feel that I cannot enter into a stipulation on that.

Mr. Maury: Then if you cannot enter into a stipulation, Mr. Lavine, I will have to offer Exhibits

34 to 45, in- [364] clusive, in evidence, and put them into the record.

The Court: That is the only thing you can do. All right: Are they offered in evidence?

Mr. Maury: The Government now offers Exhibit 34, for identification, in evidence.

Mr. Lavine: To which we object on the grounds that they were illegally seized and searched, in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

Mr. Maury: Same offer as to Exhibits 35 to 45, inclusive.

Mr. Lavine: Same objections, on the grounds that they were illegally searched and seized, in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

The Court: Objection overruled.

Mr. Lavine: Exception.

The Court: They are admitted in evidence.

Mr. Lavine: Exception.

(The documents heretofore marked for identification as Government's Exhibits 34 to 45, both inclusive, were received in evidence.)

Mr. Lavine: At this time the defendant Edward F. Zap renews his motions for a directed verdict on each and all of the counts of the indictment remaining.

I would really like to argue this with some seriousness [365] and great consideration, your Honor. I can probably do it now if you wish. I could possibly do it.

The Court: No, I am satisfied.

Mr. Lavine: You are satisfied?

The Court: Yes.

Mr. Lavine: As to each and every count?

The Court: Yes, that remains in the indictment.

Mr. Lavine: In the indictment.

The Court: Motion denied and exceptions allowed to the defendant Zap on each one of the counts.

[366]

Los Angeles, California, Monday, April 19, 1943.
9:00 A. M.

(The following proceedings were had outside the hearing of the jury:)

Mr. Lavine: The defendant Zap objects to two of the instructions proposed by the Government; one of which is in relation to the word "wilful"; and the other one is in relation to the "intent."

The Court: 46.

Mr. Lavine: The next instruction is the one on the presumption of "intent."

The Court: That is 47?

Mr. Lavine: Yes, your Honor. I object to that on the ground that in this case there is a specific intent required and no intent can be presumed.

The Court: No, it doesn't say that. It doesn't say intent is presumed. It says, "A person is presumed to intend natural and probable consequences of his act."

Mr. Lavine: That is right.

The Court: Those are the only two?

Mr. Lavine: That is correct. And may it be stipulated now that defendant excepts to any instructions which were tendered by the defendant and refused, for example, with the same effect as if the exception was taken after the Court finishes his instructions?

Mr. Maury: That may be read into the record but it is [367] not stipulated to.

Mr. Lavine: Then I will be required at the close of the Court's instructions to except to each of the defendant's instructions which are proffered instructions which the Court refuses?

Mr. Lavine: One other matter now, your Honor. The defendant at this time moves the Court to instruct the jury to disregard any of the books and records in the case which were introduced and admitted in evidence on last Friday, for the reason that there is no evidence connecting the defendant with the making, or entering, of any records in said books and records; and there is no knowledge shown on his part of those books and records; and for that reason they are clearly incompetent, irrelevant and immaterial as to him, and not binding on him.

The Court: The exception will be noted and allowed to defendant Zap. All right.

(The following proceedings were had within the hearing of the jury:)

(Mr. Maury made the opening argument on behalf of the Government.)

(At the conclusion of the opening argument by

Mr. Maury, the following further proceedings were had without the hear- [368] ing of the jury:)

Los Angeles, California, Monday, April 19, 1943.
2:15 P. M.

The Court: Mr. McCarty, we thank you for your services. You can now be excused. We seem to have a very healthy looking jury.

Gentlemen of the Jury, it becomes my duty, as Judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case and to consider the evidence for that purpose.

Counts Nos. 2, 6, 9, 12 and 13 will be withdrawn from your consideration. Those counts have been dismissed from the indictment.

The indictment or that part of the indictment that remains is as follows:

"The Grand Jurors of the United States of America, duly impaneled, sworn and charged in the District Court of the United States for the Southern District of California, Central Division, at the September 1942 Term of said Court, and inquiring for said District, do upon their oaths find and present as follows:

"1. At all times herein mentioned the [369] defendant Edward F. Zap was and is a resident of and was doing business within the Southern District of California, Central Division, under

the firm name and style of E. P. Zap Aeronautical Engineers."

The second paragraph deals with the defendant Lieutenant Commander Lloyd Scott. It is not necessary to read that because the Court has dismissed Lieutenant Commander Scott; and if I in any part of the indictment should read "Defendants," you will remember that it only applies to one.

"3. At all times herein mentioned the United States Navy was a duly constituted and lawful department and agency of the United States of America, and it was a lawful function and duty of the said Navy to design and test naval airplanes.

"4. The United States of America on or about the 22nd day of March, 1941, and on or about the 15th day of May, 1942, in the City of Los Angeles, State of California, did make and enter into certain contracts with the said Edward F. Zap. Said contracts designated and known as NXs 4105 and 83142 provided among other things that the said Edward F. Zap should engineer, design and build experimental aircraft and aircraft appliances for the United States Navy in consideration of the undertaking of the United States of America to compensate said Edward F. Zap by the payment of a fixed sum or sums for a certain [370] portion or portions of the work to be done and by the payment of other portions on the basis of cost plus a fixed fee to said Edward F. Zap.

"5. On or about the 23rd day of September, 1942, at Los Angeles, California, and at other places within the jurisdiction of this Court, to the Grand Jurors unknown, all within the Southern District of California, Central Division, defendants Edward F. Zap did unlawfully, knowingly, wilfully, and feloniously make——"

I will read it as it is written and then you will omit the defendant Scott.

"5. On or about the 23rd day of September, 1942, at Los Angeles, California, and at other places within the jurisdiction of this Court, to the Grand Jurors unknown, all within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and present and cause to be made and presented for payment and approval to an officer in the Naval Service of the United States of Ameria a false claim upon and against the Government of the United States, well knowing the same to be false, fictitious and fraudulent, in the manner and by the means hereinafter set forth, to wit: [371]

"6. On or about the 23rd day of September, 1942, the defendants Edward F. Zap and Lloyd Scott did present to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the United States

naval service, a claim which falsely purported to be for reimbursement for expenses incurred pursuant to the aforementioned contract NXs 4105. Said expenses purported to be for the conducting of certain wind tunnel tests by the University of Washington, under the terms and provisions of said contracts.

"7. Defendants Edward F. Zap and Lloyd Scott well know that said claim was false and well knew that said tests had not been performed by said University of Washington pursuant to contract NXs 4105 or any other contract with the United States Navy. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States."

Count 2 has been dismissed.

"Count 3.

"12. And the Grand Jurors aforesaid upon their oaths do hereby further indict and present: All of the allegations contained in Paragraphs numbered 1, 2, 3 and 4 of Count I of this Indictment are [372] hereat realleged and incorporated by reference as if here set forth in full.

"13. Prior to the presentment of this Indictment and within one year thereof at Los Angeles, California, and at other places within the jurisdiction of this Court, to the Grand Jurors unknown, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did un-

lawfully, knowingly, wilfully, and feloniously make and use and cause to be made and used a false bill, receipt, voucher, roll, account, claim, certificate, and affidavit knowing the same to contain fraudulent and fictitious statements and entries in a matter within the jurisdiction of a department or agency of the United States of America, namely, the United States Navy in the following manner and by the following means, to wit:

"14. Prior to the presentment of this Indictment and within one year thereof, defendants Edward F. Zap and Lloyd Scott did apportion and cause to be entered upon the books and records of said Edward F. Zap false entries of and pertaining to sums of money paid to the University of Washington for conducting wind tunnel tests in such a manner as to falsely reflect and falsely represent that said moneys had been paid pursuant to the aforesaid contract NXs 4105 [373] with the United States of America. That said entries upon said books and records were false in that said sums of money had not been paid to the University of Washington, or anyone else, for conducting said wind tunnel tests for the benefit of the United States under said contract NXs 4105, or any other contract to which the United States was a party. That said books and records of said Edward F. Zap were matters within the jurisdiction of the United States Navy, in that by the terms and

conditions of said contracts between the United States Navy and said Edward F. Zap, said books were subject to scrutiny of and inspection by said United States Navy; that defendants well knew that said books and records of Edward F. Zap were to be inspected by the United States Navy for the purpose of determining the costs incurred by said Zap in performing said contracts.

"15. Said defendants Edward F. Zap and Lloyd Scott then and there well knew that said book entries were false and that said moneys had not been expended pursuant to said contract NXs 4105, or any other contract to which the United States was a party. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States. [374]

"Count 4.

"16. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if here set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3 and 4 of Count I of this Indictment and do further present and indict:

"17. That on or about the 16th day of October, 1942, at Los Angeles, California, and at other places, to the Grand Jurors unknown, within the jurisdiction of this Court and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd

Scott did unlawfully, knowingly, wilfully, and feloniously make and present and cause to be made and presented for payment and approval to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the United States naval service, a false claim, knowing the same to be false, fictitious and fraudulent, in the following manner and by the following means, to wit:

"18. On or about the 16th day of October, 1942, defendants Edward F. Zap and Lloyd Scott did make and present a claim for $4,000 upon the United States Navy for payment by presenting same to the Disbursing [375] Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California. That said claim falsely purported to be for expenses incurred by said defendants in paying William H. McAvoy for services falsely therein set forth to have been rendered by said McAvoy as a test pilot of aeronautical equipment pursuant to the aforementioned contract 83142. That said claim was false in that the sum of money actually paid to said William H. McAvoy for said services was $2,375, and no more, and not $4,000, as therein set forth.

"19. Defendants Edward F. Zap and Lloyd Scott, well knew that in fact said William H. McAvoy had been paid by said defendants the sum of approximately $2,375, and no more, for

the said services pursuant to contract 83142 and that no other and further expenses had been incurred by said defendants for the services of said William H. McAvoy. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

"Count 5:

"20. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if here set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3 and 4 [376] of Count I of this Indictment and do further present and indict:

"21. That on or about the 23rd day of September, 1942, at Los Angeles, California, and at other places, to the Grand Jurors unknown, within the jurisdiction of this Court and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously falsify and conceal and cover up by trick, scheme, and device, a material fact and make and cause to be made a false and fraudulent statement and representation in a matter within the jurisdiction of a department or agency of the United States, namely, the United States Navy, in the following manner and by the following means, to wit:

"22. On or about the 23rd day of Septem-

ber, 1942, defendants Edward F. Zap and Lloyd Scott did falsely state and represent to Hilton Byars, who was then and there the United States Navy Cost Inspector, that the sum of $4,000 had been paid to William H. McAvoy for acting as test pilot in conducting certain tests pursuant to said contract 83142, and did present to said Cost Inspector in support of said false statement and representation a cancelled check for $4,000 endorsed by said William H. McAvoy. That defendants had previously presented to said McAvoy [377] a check in blank and requested said McAvoy to endorse the same. That said McAvoy did so endorse the same, and thereafter the defendants filled the same in in the figure of $4,000, and thereafter the defendants presented the same to the bank upon which it was drawn for payment, and received payment thereon, and thereafter presented to said Navy Cost Inspector said check, cancelled, in the sum of $4,000 and endorsed by said William H. McAvoy, as aforesaid.

"23. Defendants Edward F. Zap and Lloyd Scott well knew that said McAvoy had been paid approximately $2,375, and no more, for conducting said test flights and that no other further sums had been incurred for and on account of said test flight expenses, and defendants Edward F. Zap and Lloyd Scott well knew

that said cancelled check for $4,000 had been endorsed by said William M. McAvoy while the said check was blank and before said figure of $4,000 had been placed thereon. All of which is contrary to the form of statute in such case made and provided and against the peace and dignity of the United States."

Count 6 is withdrawn from your consideration.

"Count 7.

"28. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if herein set forth in full each and every allega- [378] tion and statement contained in Paragraphs 1, 2, 3 and 4 of Count I of this Indictment and do further present and indict:

"29. That on or about the 9th day of October, 1942, at Los Angeles, California, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and present and cause to be made and presented to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the naval service of the United States, a false claim upon and against the Government of the United States, well knowing the same to be false, fictitious, and fraudulent in the following manner and by the following means, to wit:

"30. On or about the 9th day of October, 1942, defendants Edward F. Zap and Lloyd Scott did present a false claim to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer of the United States Navy for reimbursement for expenses falsely stated thereon to have been incurred pursuant to the aforementioned contract 83142, for a trip to Daggett, California, for the purpose of making test [379] flights on a naval airplane.

"31. Defendants Edward F. Zap and Lloyd Scott well knew that said falsely claimed expenses had not been incurred or expended by them under and pursuant to said contract 83142, or any other contract to which the United States was a party; and the defendants then and there well knew that in truth and in fact said expenses were fictitious and had not been incurred or expended by them under and pursuant to any contract to which the United States was a party, or otherwise or at all. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States.

"Count 8.

"32. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate by reference as if herein set forth in full each and every allegation and statement contained in

Paragraphs 1, 2, 3 and 4 of Count I of this Indictment and do further present and indict:

"33. That prior to the presentment of this Indictment and within one year thereof at Los Angeles, California, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously falsify and conceal and [380] cover up by trick, scheme, and device a material fact and make a false and fraudulent statement and representation in a matter within the jurisdiction of a department and agency of the United States, namely, the United States Navy, in the following manner and by the following means, to wit:

"34. Prior to the presentment of this Indictment and within one year thereof defendants Edward F. Zap and Lloyd Scott did falsely represent to Hilton Byars, who was then the Navy Cost Inspector, that certain expenses had been incurred by said Edward F. Zap in connection with a trip to Daggett, California, pursuant to the said contract 83142 for the purpose of testing the design of an airplane and of the parts thereof.

"35. Said defendant Edward F. Zap and Lloyd Scott then and there well knew that the said expenses had not been incurred by said Edward F. Zap under and pursuant to the terms and conditions of said contract 83142, or otherwise or at all. All of which is contrary to the

statute in such case made and provided and against the peace and dignity of the United States."

Count 9 has been withdrawn from your consideration.

"Count 10.

"40. And the Grand Jurors aforesaid upon their [381] oaths do hereby reallege and incorporate by reference as if herein set forth in full each and every allegation and statement contained in Paragraphs 1, 2, 3 and 4 of Count I of this Indictment and do further present and indict:

"41. That on or about the 4th day of May, 1942, at Los Angeles, California, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and present and cause to be made and presented for approval and payment to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the United States naval service, a false claim, well knowing the same to be false, fictitious, and fraudulent in the following manner and by the following means, to wit:

"42. On or about the 4th day of May, 1942, defendants Edward F. Zap and Lloyd Scott did present a false claim for reimbursement to

the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the United States naval service. That said claim was false in that it purported to be a claim for moneys paid to one L. E. Reed pursuant to said contract 83142 for the construction [382] and fabrication of certain model airplane work commonly known as 'mock-ups.'

"43. Said defendants Edward F. Zap and Lloyd Scott well knew that said 'mock-ups' had not in fact been constructed pursuant to contract 83142 and that said 'mock-ups' had not been constructed by the defendants pursuant to any other contract with the United States Navy, and defendants well knew that in truth and in fact said 'mock-ups' had been used in certain private experiments of defendant Edward F. Zap. All of which is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

"Count 11.

"44. And the Grand Jurors aforesaid upon their oaths do hereby reallege and incorporate each and every allegation and statement contained in Paragraphs 1, 2, 3 and 4 of Count I of this Indictment and do further present and indict:

"45. That prior to the presentment of this Indictment and within one year thereof defend-

ants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously falsify and conceal and cover up by trick, scheme, and device a material fact and make and cause to be made false and fraudulent statements and representations in a matter within the [383] jurisdiction of a department and agency of the United States, namely, the United States Navy, in the following manner and by the following means, to wit:

"46. On or about the 4th day of May, 1942, said defendants Edward F. Zap and Lloyd Scott did falsely represent to Hilton Byars who was then the Navy Cost Inspector that a receipt for moneys paid by them in the sum of $1100 given to defendants by L. E. Reed was a receipt evidencing expenses incurred and paid by said defendants pursuant to said contract 83142. That defendants well knew that said receipt was a matter within the jurisdiction of the United States Navy, and that the same was to be inspected by the United States Navy in order to determine the cost to said Edward F. Zap of performing said contract.

"47. Defendants Edward F. Zap and Lloyd Scott well knew that said representations were false in that not all the work was paid for with the moneys for which said receipt was given by said Reed was done pursuant to and in performance of contract 83142 and that approximately $700 of said work was done upon certain

private experiments of defendant Edward F. Zap and not pursuant to any contract to which the United States Government was a party. All of which is contrary to the statute in such case made and [384] *and* provided and against the peace and dignity of the United States."

Counts 12 and 13 are withdrawn from your consideration.

"60. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States."

Now, to each of those counts the defendant has pleaded not guilty.

By the finding of an indictment no presumption whatever arises to indicate the defendant is guilty or that he has any connection with or responsibility for the act charged against him. A defendant is presumed to be innocent at all stages of the proceedings until the evidence introduced on behalf of the Government shows him to be guilty beyond a reasonable doubt, and this rule applies to every material element of the offense charged. Mere suspicion or mere probability will not authorize a conviction. A reasonable doubt is such a doubt as you may have in your minds when, after thoroughly and impartially examining all of the evidence, you do not feel satisfied to a moral certainty of the defendant's guilt. In order that the evidence submitted shall afford proof beyond a reasonable doubt it must be such as you would be willing to act

upon on the most important and vital matters relating to your own affairs. Reasonable doubt is not a mere possibility or imaginary doubt or a bare conjecture, for it is difficult to prove a thing to be an absolute certainty. You [385] are to consider the strong probabilities of the case. A conviction is justified only when such probabilities exclude all reasonable doubt as the same has been defined to you. Without it being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered in connection with and accompanying all of the instructions that are given to you. If, upon consideration of the whole case, your are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant, or any of them, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence.

You are the sole judges of the credibility and the weight which is to be given the different witnesses who testified upon this trial. In judging of the credibility of witnesses, you will have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be repelled by contradictory evidence, by the manner in which a witness testifies, by the character of his testimony, or by other evidence. In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it; as

may be dictated by your judgment as reasonable men. You should carefully scrutinize the testimony given and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the [386] stand, his intelligence, the relation which he bears to the parties to the action, the manner in which he might be affected by the verdict, and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. You are not bound to decide in conformity with the testimony of a number of witnesses which does not produce conviction in your mind as against the declarations of a lesser number or a presumption or other evidence which appeals to your minds with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice or from a desire to favor one side against the other. It does mean that you are not to decide an issue by the single process of counting the number of witnesses who have testified on opposing sides. It means that the final test is not in the relative number of witnesses but in the relative convincing force of the evidence. The testimony of one witness entitled to full credit is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses testified to the contrary, if from the whole case, considering the credibility of the wit-

nesses, and after weighing the various factors of evidence, the jury should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness. A witness false in one part of his [387] testimony is to be distrusted in others. That is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless from all the evidence you shall believe the probability of truth favors his testimony in other particulars.

The defendant has offered himself as a witness and has testified in this case. Having done so, you are to estimate and determine his credibility in the same way as you would consider the testimony of any other witness. It is proper to consider all of the matters that have been suggested to you in that connection, including the interests that the defendant may have in the case, his hopes and fears and what he has to gain or lose as a result of your verdict.

You are not limited in your consideration of the evidence to the bald expressions of the witnesses. You are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experiences as reasonable men.

Admissions of a defendant are to be received by you with caution.

You are instructed that if you believe that Edward F. Zap at all times acted in good faith and believed that his claims, accounts and statements

were true and correct, then the Government has failed in its proof, even though he may have been mistaken.

Evidence may be either direct or indirect. Direct evi- [388] dence is that which proves a fact in dispute directly and without any inference or presumption, and which in itself, if true, conclusively establishes the fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue but which affords an inference or presumption of its existence. Indirect evidence is of two kinds; namely, presumptions and inferences. A presumption is a deduction which the law expressly directs to be taken from particular facts. Unless declared by law to be conclusive it may be controverted by other evidence, direct or indirect, but unless so controverted the jury is bound to find in accordance with the presumption. An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from these facts as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature. The word "propensity" as used in these instructions means any natural or habitual inclination or tendency.

You are instructed that it is no offense under the statute to make a claim upon the Government for

the payment of a demand that is without merit unless the person who makes it understands at the time that he made it that it is a false, [389] fictitious or fraudulent demand and, therefore, intended to defraud the Government.

The gravamen of the offense is the wilful and deliberate presenting of the false claim. You are instructed that you have a right to take into consideration all of the facts with respect to the contractor's relation to the Government and whether, under all of the facts and circumstances of his relationship, it was reasonable to believe that he had filed a false claim with the Government. You have a duty to consider all of his transactions.

You are instructed that before the person charged can be convicted of wilfully filing a false claim, the Government must prove beyond a reasonable doubt that the accused presented the claim with a conscious knowledge that it was not true, and with the intent that it would be received as a statement of what was true in fact, well knowing that it was not true. To do a thing wilfully is to do it by design, with set purpose. It is incumbent upon the Government to prove the wilful intent.

The accused cannot be guilty of wilfully presenting a false claim where the claim is according to the belief and conviction of the accused as to its truth, and if you find from the evidence that the accused did not wilfully present a false claim, or if you have a reasonable doubt as to whether it was or was not wilful, you must acquit the accused. In other words,

if you find that the claim presented was ac- [390] cording to the belief and conviction of the accused as to its truth, even though in fact it was erroneous you must acquit the accused.

You are instructed that there is a very real and vital difference in simply doing an act and doing an act wilfully. In the first instance no bad intent or purpose is involved, while in the second instance of wilfully doing an act, the elements of guilty knowledge and bad purpose are involved and constitute the gist of the offense. The use of the word "wilfully" in that connection in an indictment implies not merely fraudulently doing an act, but also doing it with an evil intent and bad purpose to do wrong.

You are instructed that the word "wilful" is used in the statute in this case, and means a thing done without ground for believing it to be lawful, or conduct marked by careless disregard as to whether or not the thing done is lawful.

You shall not consider as evidence any statement of counsel made during the trial unless such statement was made as an admission or stipulation conceding the existence of a fact or facts. You must not consider for any purpose any evidence offered and rejected or which has been stricken out by the Court. Such evidence is to be treated as though you never heard it. You are to decide this case solely upon the evidence that has been admitted by the Court and the inferences that you may reasonably draw therefrom and such pre- [391] sumptions as

the law may deduce therefrom, as directed in my instructions and in accordance with the law as I state it to you.

At times throughout the trial the Court has been called upon to pass upon the question as to whether or not certain offered evidence might properly be admitted. With such rulings and the reasons for them you are not to be concerned. Whether offered evidence is admissible is purely a question of law, and from a ruling on such a question you are not to draw any inference as to what weight should be given the evidence or as to the credibility of a witness. In admitting evidence to which an objection is made the Court does not determine what weight should be given such evidence. As to any offer of evidence that has been rejected by the Court you, of course, must not consider the same. As to any question to which an objection was sustained you must not conjecture as to what the answer might have been or as to the reason for the objection.

In judging of the evidence you are to give it a reasonable and fair construction. You are not authorized, because of any feeling of sympathy or other bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling or bias, you should reach a contrary conclusion. Whenever, after a careful consideration of all the evidence, your minds are in that state where a conclusion of innocence is indicated [392] equally with a conclusion of guilt, or there is a reasonable doubt as to whether

the evidence is so balanced, the conclusion of innocence must be adopted.

If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me and none should be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and to regard each in the light of all the others.

There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict.

In determining what your verdict shall be you are to consider only the evidence before you. To the jury exclusively belongs the duty of determining the facts. The law you must accept from the Court as correctly declared in these [393] instructions.

You are instructed that if the Judge has said or

done anything which has suggested to you that he is inclined to favor the claims or position of either party you will not suffer yourself to be influenced by any such suggestion. I have not expressed nor intended to express, nor have I intimated, nor intended to intimate any opinion as to what witnesses are or are not worthy of credence, what facts are or are not established, or what inferences should be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it.

You must weigh and consider this case without regard to sympathy prejudice or passion for or against any party to the action. The attitude of the jurors at the outset of their deliberations is a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case, or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if and when shown that it is fallacious.

Remember that you are not partizans or advocates in this matter, but you are judges. The final test of the quality of your service will be in the verdict that you return to this court room, not in the opinions any of you [394] may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you

arrive at a just and proper verdict in this case. To that end, the Court would remind you that in your deliberations in the jury room that there can be no triumph excepting the ascertainment and declaration of the truth. It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement if you can do so without violence to your individual judgment. To each of you I would say that you must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous.

However, you should not be influenced to vote in one way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of other jurors.

Upon retiring to the jury room you will select one of your number to act as foreman who will preside over your deliberations, and who will sign the verdict to which you agree. As soon as you shall have agreed upon a unanimous verdict you shall have it signed and dated by your foreman and then shall return with it to this court room. [395]

Two verdicts will be handed to you, or two papers upon which the verdicts are to be rendered.

"In the District Court of the United States In and For the Southern District of California, Central Division.

No. 15728 Criminal

United States of America,

Plaintiff,

vs.

Lloyd Scott,

Defendant.

DIRECTED VERDICT OF THE JURY AS TO SCOTT

We, the Jury in the above-entitled case find the defendant Lloyd Scott not guilty on each of the 13 counts of the Indictment.

Dated, Los Angeles, California, April ... 1943."

Which verdict I instruct your foreman to sign and return into court. [396]

"In the District Court of the United States In and For the Southern District of California, Central Division.

No. 15728 Criminal

United States of America,

Plaintiff,

vs.

Edward F. Zap,

Defendant.

VERDICT OF THE JURY

We, the jury in the above-entitled case find the defendant Edward F. Zap"——

and then you will find a blank, and then after the blank the words will be "as charged in the first count of the indictment;" and in that blank you will write "guilty" or "not guilty," whatever is your determination, as to the first count, third count, fourth count, fifth count, seventh count, eighth count, tenth count and eleventh count; all of which are separately stated on this blank which will be handed to you.

"Dated, Los Angeles, California, April ....., 1943."

Then a line, and under the line is written "Foreman of the jury." Swear the bailiff.

Mr. Lavine: May it please the Court, before the jury retires may I approach the bench on certain exceptions to the instructions?

The Court: All right. [397]

DEFENDANT'S INSTRUCTION No. 1

The charge of filing a false claim means filing a claim that is willfully and deliberately false, and not one presented in error of the true facts or without willful design or intention of wrong doing. It is not the intent of the Government or the law that a mistake of fact, if you find that one did occur, constitutes a false claim, for in the course of business errors may occur. It is only where a claim is willfully and deliberately false that you can find a charge of presenting a false claim to be sustained by the evidence, and if the Government has failed to prove such willful and deliberate falsity, you must acquit the accused.

DEFENDANT'S INSTRUCTION No. 2

The gravamen of the charges in this case is the willful presentation of a false claim, well knowing the same to have been false. It is incumbent upon the Government to prove the element of willfulness, as I shall hereinafter define that word. It is also incumbent upon the Government to prove knowledge and deliberate acts on the part of the accused to present a false claim to the Government, with intent to defraud the Government. A claim which is in fact false or erroneous, and is presented inadvertently through mistake, or through lack of knowledge of the true facts, is not such a false claim as is contemplated by the statutes; and if you find from the evidence, or accidentally, or [398] without the knowledge or consent of Edward F. Zap, or with-

out any knowledge on his part that the claim was in fact false, you must acquit him.

DEFENDANT'S INSTRUCTION No. 3

You are instructed that mistakes of fact, or errors of fact, which were not committed wilfully and corruptly, but which may have been either the result of negligence or carelessness in coming to that belief or conclusion of the mind, without taking the proper pains to enable the accused to ascertain the correctness of the claim, do not make the claim corrupt, and such claim cannot be wilful or corrupt where the claim is according to the belief and conviction of the accused as to its correctness at the time he made it. Even if you find that the accused may have filed a claim rashly and inconsiderately, as to what they believed to be true, the claim would still not be wilfully false.

People v. Von Tiedeman, 120 Cal. 128, 136, 137

United States v. Shellmire, Bald. 370

DEFENDANT'S INSTRUCTION No. 7

The law does not require any defendant to prove his innocence, which, in many cases, might be impossible to do, but on the contrary, the law requires that the Government establish his guilt by legal evidence and beyond a reasonable doubt. The presumption of innocence with which a de- [399] fendant is at all times clothed is not a mere form to be disregarded by you at pleasure, but is an essential,

substantial part of the law, and is binding on you in this case, and it is your duty to acquit the defendant unless the evidence in this case convinces you of his guilt as charged beyond a reasonable doubt. If you can reconcile the evidence before you, upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that event find the defendant not guilty. You cannot find the defendant guilty unless from all the evidence before you, you believe him guilty beyond a reasonable doubt. [399-a]

DEFENDANT'S INSTRUCTION No. 8

A reasonable doubt is a doubt based on a reason and which is reasonable in view of all the evidence. If, after an impartial comparison and consideration of all the evidence, or from a lack of sufficient evidence on behalf of the Government to convince you of the truth of the charge, you can candidly say you are not satisfied of the defendant's guilt and you have a reasonable doubt, your duty would be to acquit the defendant.

DEFENDANT'S INSTRUCTION No. 9

The good faith of the defendant Edward F. Zap is to be determined, and his acts and declarations are to be construed and interpreted in the light of his position as a scientist and as they appeared to him at the time of the occurrences. The defendant is not here on trial for errors or mistakes in the manner of handling accounts or for any inadvert-

ence or incorrect accounting. He is on trial for a criminal offense, the essential element of which is an evil or criminal intent. This the Government must prove to your satisfaction beyond a reasonable doubt and to a moral certainty, and if they have failed to do so then it is your duty to acquit the defendant.

[400]

DEFENDANT'S INSTRUCTION No. 11

You are instructed that Counts I, II and III charge the same offense in different language of the statute; that Counts IV, V and VI of the indictment charge the same offense in different language of the statute; that Counts VII, VIII and IX charge the same offense in different language of the statute; that Counts X, XI and XII charge the same offense in different language of the statute.

Each count must be considered by you as though it were a separate indictment but in connection with each count. It is your duty to acquit the defendant of all of the counts where you find that the evidence does not sustain them.

DEFENDANT'S INSTRUCTION No. 12

The intent of the defendant under the provisions of the law pursuant to which this prosecution is conducted is a material element necessary to prove the offense, and in arriving at a decision on that question all the facts and circumstances shown in the case as to the conduct of the defendant should be considered. If a man makes a claim which does not properly exist, but it appears that he had rea-

sonable grounds to believe that the claim was as he stated it, such statements and conduct are to be taken into consideration by you in determining whether they were innocent misstatements and were made in good faith. If such [401] claims or statements, alleged to have been falsely and fraudulently made were made in good faith and the defendant believed at the time that they were correct, or had reason to believe them to be correct, you must acquit him.

DEFENDANT'S INSTRUCTION No. 13

It is a complete defense to the charges alleged in the indictment that any claim or claims were signed through inadvertence, mistake or accident, and if you find from the evidence that any claim or claims were mistakenly signed under the wrong heading, or because they were mistakenly entered, you must acquit the accused.

DEFENDANT'S INSTRUCTION No. 14

The good faith of the accused in presenting a claim is always a matter to be considered by the jury, and if the jury finds that the accused acted in good faith, even though mistaken, you must acquit him.

DEFENDANT'S INSTRUCTION No. 16

You are instructed that a contractor has a right to rely on the system and procedure which the Government follows in the handling of its claims, and

he has a right to rely on the fact that any bills or requests for funds in a cost plus fixed fee contract must be first audited, inspected and approved by Navy cost inspectors, and if you find that [402] Edward F. Zap relied on such inspection and his belief in the accuracy of the approval of the Navy cost inspector, then you must acquit him of such charge or charges on which he so relied, even though in fact the cost inspector approved an erroneous item.

DEFENDANT'S INSTRUCTION No. 17

You are instructed that you must not bring in a verdict in this case to aid one department of the Government against the other.

DEFENDANT'S INSTRUCTION No. 18

You are instructed that you must not compromise your verdict, as to some counts for other counts.

DEFENDANT'S INSTRUCTION No. 19

The defendant Edward F. Zap adopts all of the general instructions pertaining to his case which are offered by defendant Lloyd V. Scott, as though offered by defendant Edward F. Zap and fully herein set out. This is done in order to save duplication of instructions.

DEFENDANT'S INSTRUCTION No. 19a

You are instructed that a contractor has a right to rely on his employees and his belief in the regu-

larity of [403] their transactions. It is a presumption of law that business transactions are regularly performed and carried out, and the contractor has a right to rely on this presumption, and if you find that Edward F. Zap relied on the presumption that his employee or employees were properly carrying out their work and making proper entries and proper check on the accounts, you must acquit him, even though it may be that he certified to some account or accounts as being correct when in fact they may have been incorrect. The law does not seek to punish a contractor for mere mistake of his employees or their inefficiency, but only provides that if a claim is wilfully false to the knowledge of the contractor, and the contractor has submitted a wilfully false claim with a design to cheat and defraud.

If you find in this case that Edward F. Zap had no intention to present a false claim, then you must acquit him, even though some item or items might be false or incorrect in fact.

DEFENDANT'S INSTRUCTION No. 18a

The submission of items to the Navy for its cost inspection is not a claim within the meaning of the statute. Nor is the approval thereof by the Navy a claim within the meaning of the statute. It is only the final voucher claim for bill which is presented after all of the inspection and audit is made that is the claim upon which the Government [404] may base the charge of presenting a false claim, and if such a claim was made only after due audit and in-

spection by the Navy itself and the accused had seen the approval by the Navy cost inspector of the item, and relied upon it as a certification that the claim was true and correct, even though the naval cost inspector was in fact mistaken, you must acquit the accused.

DEFENDANT'S INSTRUCTION No. 19

You are instructed that by making a claim as defined in the statute, is meant the asking or demanding on the part of the defendant from the Government of payment for services. It is not the preliminary request for audit or inspection and approval of the items that constitutes the making of a claim, but it is the actual claim itself after the same has been submitted for audit and approval and submitted to the Navy Department for payment, that constitutes the claim within the meaning of the statute.

United States v. Bittinger, 24 Fed. Cas. No. 14599

DEFENDANT'S INSTRUCTION No. 20

You are instructed that cost-plus-a-fixed-fee contract is somewhat analogous to a partnership. Under such an agreement the contractor and the Government work together for the attainment of the object of the contract. Such contracts are not let upon bid to the lowest bid, as was custo- [405] marily the case during past time. Instead of the bid method of letting a contract, the Government,

when using the cost-plus-a-fixed-fee method of contracting consummates the agreement by negotiation. In many cases the contract will be between two or more separate contracting firms acting jointly on the one hand, and the Government on the other. Again, under the cost-plus-a-fixed-fee contract the Government exercises constant control and supervision of the work during the entire life of the project. When the work is commenced the contractor may not even know the exact details of all the work to be done. It is a fact that in a great many of these contracts the contractor knows only the location and the general type of the work to be undertaken. Exact specifications are worked out as the work progresses. This is the antithesis of the procedure where the contract is upon a fixed fee. In the latter case the Government takes no supervisory interest in the contract. It lets the contract for a fixed price. When the work is completed and accepted the contractor is paid the fixed price and it is immaterial how much the contractor has paid for the work to be done for the Government must, in the event, pay the fixed price when the work is completed.

In a fixed price contract there is no relationship even remotely resembling a partnership between the Government and the contractor. Rather, the relationship is more [406] nearly that of a vendor and a vendee. In such a case the Government is only concerned with the fact that the work has been done according to the fixed fee.

The Government uses the fixed fee type of contract generally in cases where it desires the speediest method of accomplishing the desired work. The cost-plus-a-fixed-fee contract is one in which the Government lets certain work to a contractor and in effect says to the contractor, "You do the work, we will pay all costs of performance, and in addition, we will pay you a certain fixed fee." In the case of fixed fee contracts no Government supervision is necessary, and the contractor has a right to bill the Government for the fixed fee.

In the case of a cost-plus-a-fixed-fee contract the Government audits and re-audits and makes checks of it before payment is made.

If you find from the evidence that any of the accounts charged in the indictment were fixed fee accounts, or if you find that the contractor reasonably believed they were fixed fee accounts and charged them as such you must acquit him, if his claim was as to the fixed fee amount.

If you find from the evidence that the contractor, in filing a claim on accounts which were cost plus, did so based upon his belief as to the accuracy of the audit and inspection of his own auditor, as well as an audit and inspection by auditors acting for the United States Govern- [407] ment, and that he believed their audits represented a truthful and accurate check of the accounts, then you must acquit Edward F. Zap in this case.

DEFENDANT'S INSTRUCTION No. 21

You are instructed that you must take into consideration the fact that auditors and bookkeepers were charged with the duty of examining and inspecting the accounts, and advising Mr. Zap of their correctness or incorrectness, and you may take that into consideration in determining whether his acts were wilfully or corruptly done, or whether they were in good faith and to the best of his knowledge and belief, and if you find from the evidence that they were in good faith and that he acted to the best of his knowledge and belief, you must acquit the accused.

DEFENDANT'S INSTRUCTION No. 22

You are instructed that if there are two reasonable interpretations which you can place upon the evidence, one leading toward innocence and the other leading toward guilt, you must adopt that one leading toward innocence and reject that one leading toward guilt.

DEFENDANT'S INSTRUCTION No. 25

You are instructed that T.D. 5,000, which is a provision in the contracts between Edward F. Zap and the United States Government, provides as follows: [408]

"(d) Other manufacturing cost. — Other manufacturing cost as used in paragraph (b) of this section includes items of manufacturing costs which are not properly or satisfactorily chargeable to factory costs (see paragraph (c)

of this section) but which upon a complete showing of all pertinent facts are properly to be included as a cost of performing the contract or subcontract, as for instance, payments of royalties and amortization of the cost of designs and patent rights over their useful life; and 'deferred' or 'unliquidated' experimental and development charges. For example, in case experimental and development costs have been properly deferred or capitalized and are amortized in accordance with a reasonably consistent plan, a proper portion of the current charge, determined by a ratable allocation which is reasonable in consideration of the pertinent facts, may be treated as a cost of performing the contract or subcontract. In the case of general experimental development expenses which may be charged off currently, a reasonable portion thereof may be allocated to the cost of performing the contract or subcontract. If a special experimental or development project is carried on in pursuance of a contract, or in anticipation of a contract which is later entered into, and the expense is not treated as a part of general experimental and [409] development expenses or is not otherwise allowed as a cost of performing the contract, there clearly appearing no reasonable prospect of an additional contract for the type of article involved, the entire cost of such project may be allowed as a part of the cost of performing the contract."

Under the terms of this provision of the contract you are instructed that any experimental work done by Edward F. Zap in anticipation of a contract is a proper item chargeable to the Government of the United States.

DEFENDANT'S INSTRUCTION No. 27

If you find from the evidence that the charge for the flight test was for the flight test and insurance, and that the item of $4,000 was a fixed fee, or that Edward F. Zap had reasonable grounds to believe that it was a fixed fee, you must acquit him of Counts IV and V of the Indictment. [410]

DEFENDANT'S INSTRUCTION No. 28

Your are instructed that if you find that the defendant Edward F. Zap believed that the items were correctly made out by his bookkeeper or his accountants, or that he relied on them in the belief that the items were correct, you must acquit him.

DEFENDANT'S INSTRUCTION No. 29

You are instructed that if Edward F. Zap believed that the item of $4,000 was a fixed-fee, you must acquit him of the charge contained in Counts IV and V of the Indictment.

DEFENDANT'S INSTRUCTION No. 30

You are instructed that if Edward F. Zap honestly believed that he had a right to carry on experimental work under the terms and provisions of

Treasury Department 5,000 in advance of receiving a Government contract, and if you believe that he otherwise charged the Government only what he honestly believed to be due under the provisions of Contract NXs-4105, you must acquit him of Counts I and III of the Indictment. [411]

DEFENDANT'S INSTRUCTION No. 32

You are instructed that the item in the contract for flight test and insurance was a fixed fee, and therefore it was immaterial how the items were entered in the books, because it was a fixed item which the Government had to pay under the terms of the contract; therefore if you so find, it is your duty to acquit the defendant Edward F. Zap of Counts IV and V of the Indictment. [412]

(Whereupon, the following proceedings were had at the bench and outside the hearing of the jury:)

Mr. Lavine: Now my second exception, your Honor, is to the instruction in which you singled out the defendant in stating that his hopes, his fears, his previous relations to the case, and so forth, may be taken into consideration by the jury. It is an instruction singling out the defendant from other witnesses and the character of their consideration of his testimony.

The Court: Well, in other words, I should say that they are not to consider his hopes and his fears, is that it?

Mr. Lavine: No—yes, your Honor. That portion should have been omitted, and the statement is that the defendant must be considered the same as any other witness, under the same standards as any other witness.

The Court: In other words, a witness who is not on trial at all is to be judged in the same way as this defendant?

Mr. Lavine: The defendant's testimony is to be judged in the same way as any other witness.

Mr. Maury: I submit that any possible error, and we admit none, in that instruction was cured by the instruction to the jury generally that the jury are the sole judges of the credibility of the witnesses and that they may take into consideration the relation that each witness has to the case.

The Court: I took that from Judge James' instructions, as I remember it. [413]

Mr. Lavine: It is still a bad instruction, though.

The Court: Well, that's all right.

Mr. Lavine: Now the third exception, your Honor, is that one instruction that you gave at the very last of the instructions, regarding the element of wilfullness; that where the conduct of the defendant is marked by careless disregard as to whether his conduct is lawful. That is not a criminal standard of guilt. Careless disregard of truth even in a perjury case is not such an element as to make the offense wilful; and I could submit authorities on that, your Honor. That is a civil standard, and

very proper in a civil case, but not in a criminal case.

The Court: These are both criminal cases. The Supreme Court of the United States has sustained this. U. S. vs. Philadelphia Railway, 223 Fed. 207, at 210; and U. S. vs. Murdock, 290 U. S. 389; 54 Supreme Court 223.

Mr. Lavine: I will make my exception, your Honor.

The Court: Yes.

Mr. Lavine: All right. The next exception, your Honor, is the failure to give an instruction as to Treasury Decision 5000. We have a reference to it in the contract. The jury would not know the law with reference to it without an instruction as to the matter of law as to the terms of that section, and I think we are entitled to have that given to the jury.

The Court: What is the Government's position on that?

Mr. Maury: The Government's position there is this; [414] that the Treasury Decision 5000 is in the nature of a regulation; that the Court might give an instruction framed upon it, but to give the entire Treasury Decision itself would be so long and so involved as to serve no purpose whatsoever but to confuse the jury, and that the absence of such an instruction in no wise prejudices the Government's case.

Mr. Lavine: We only ask——

Mr. Maury: I mean in no wise prejudices the defendant's defense.

Mr. Lavine: It definitely prejudices the defense under the theory of the case as regards the cargo plane project, and we only ask for the giving of that one section relating to new projects.

Mr. Maury: Well, that one section itself relates to many other sections in the same Treasury Decision which were not read to the jury, and we submit should not be, any more than that one should have been read to the jury. The Government, of course, has no voice to cry error and can never appeal or anything of the sort, but we do feel it was error on the part of the defense counsel to arrogate to himself the supposed right to read to the jury what the law is.

The Court: Well, you have got your record on that, of course.

Mr. Lavine: Well, it definitely relates to the theory of the defense of this case, your Honor, and we have no other way of presenting it to the jury as a matter of law. [415] It is purely a question of law as to that portion of the contract. We have the contracts in evidence. The contract refers to those sections, and it relates to our theory of the defense, and we except to the failure to give that.

Mr. Maury: The Government reiterates its stand that the construction urged by the defendant is not a proper construction of the Treasury Decision.

The Court: Yes, it seemed to be quite broad, that any experimental work that was done by Edward F.

Zap was a proper item chargeable, which I think would take entirely away from the jury that entire question that they are supposed to have passed on. However, Mr. Lavine has made his record.

Mr. Lavine: Now we except to the refusal of each and every other instruction which the defense tendered and which the Court did not give on the ground that we have presented them to the Court and the Court has considered each of them and that they are a proper and correct statement of the law, particularly as relates to the defense theory of the case as presented in the evidence in this case.

Does your Honor desire me to point out each and every one of those instructions?

The Court: It is entirely up to you.

(The following defense instructions were refused.)

[416]

Mr. Lavine: May I have the refused instructions then? This is the time I have to do it.

Defendant's Instruction No. 1 which has been refused is a correct statement of the law as to what is a wilful and deliberate claim, and applies to the defense theory of the case.

Defendant's Instruction No. 2 points out the gravamen of the charge is the element of wilfulness and that even though a claim is, in fact, false or erroneous, if presented inadvertently, through mistake or through lack of knowledge of the true facts, is not such a false claim as contemplated by the statutes; and that is a correct statement of the law.

Defendant's Instruction No. 3, the principle in-

volved is that "even if you find that the accused may have filed a claim rashly and inconsiderately as to what they believed to be true, the claim would still not be wilfully false; and if the claim is a result of negligence or carelessness in coming to that belief or conclusion of mind, it does not make the claim corrupt and wilfully false."

Defendant's Instruction No. 7 is an instruction on the burden of proof on the Government, and is a correct statement of the law.

Defendant's Instruction No. 8 is a correct statement of the law.

Instruction 9 revolves around the defendant's good faith and that he is not on trial for errors or mistakes in the handling of accounts or for inadvertent or incorrect accounting. This was one of the theories of the defendant [417] in the case.

Defendant's Instruction No. 11 simply instructs the jury to take into consideration each count separately and independently, and is a correct statement of the law.

Defendant's Instruction No. 12 relates to the defendant's intent and that if he had reasonable grounds to believe that the claim was just, even though mistaken, it would not be a violation of the law.

Instruction No. 13 is to the effect that it is a complete defense to the charge alleged in the indictment that any claim was signed through inadvertence, mistake or accident, and that any claim or claims were mistakenly signed under the wrong heading.

would not warrant a conviction and would entitle the accused to an acquittal; is a correct statement of the law.

Defendant's Instruction No. 14 relates to the good faith of the defendant, even though mistaken.

Defendant's Instruction No. 17 relates to possible aiding one department of the Government against the other.

Defendant's Instruction 19 relates to not comprising the verdict.

Defendant's Instruction renumbered 19, the second No. 19, apparently, was merely an adoption of the instructions offered by counsel for the defendant Scott at the opening of the case as though given by the defendant Zap, and was merely offered to avoid duplication. [418]

Defendant's Instruction 16 relates to the defendant's theory of the case: that a person filing claims with the Government, a contractor particularly, has a right to rely on the system and procedure which the Government follows in the handling of its claims and he has a right to rely on the fact that those are audited, inspected and approved, and if he did so rely it would be his right to believe in the accuracy of the approval of the naval cost inspectors, it would entitle him to an acquittal, even though, in fact, the inspector approved an erroneous claim.

The second No. 19 here, which I would like the Court's permission to add an A to, so as to distinguish from the other 19——

The Court: Yes.

Mr. Lavine: 19-A is a statement that a contractor has a right to rely on his employees and his belief in the regularity of their transactions, and that it is a presumption of law that business transactions are regularly performed and carried out, and the contractor has a right to rely on this presumption; and is a correct statement of the law, as to the fact that the law does not seek to punish a contractor who relies on the presumption that his employees were properly carrying out their work, and that if there was no intent on the part of the contractor to defraud the Government he must be found not guilty.

Defendant's Instruction 18-A is an instruction that [419] the submission of an item to the Navy for its cost inspection is not a claim within the meaning of the statute, nor is the approval thereof by the Navy a claim within the meaning of the statute. It is only the final voucher, claim, or bill which is presented after all the inspection and audit is made that is the claim. This is a correct statement of the law and relates particularly to the defendant's theory of the case, and it is being refused.

Defendant's Instruction No. 17 is a definition of a claim within the meaning of the statute; not the preliminary audits or inspection, but the actual claim itself; and is a correct statement of the law and is not given.

Then there is an instruction offered as Defendant's Instruction 20, explaining as a matter of law the difference between a cost-plus-fixed-fee contract

and the fixed fee or fixed price contracts. This is a correct statement of the law and is not given.

Defendant's Instruction 21 is an instruction that the jury has a right to take into consideration the fact that auditors and bookkeepers were charged with the duty of examining and inspecting the accounts and in advising Mr. Zap of their correctness or incorrectness, and they have to take into consideration those facts in determining whether Mr. Zap's acts were wilfully and corruptly done.

Defendant's Instruction No. 22 involves the question of reasonable interpretation to be placed upon the evidence. [420]

The Court: Do you except to that?

Mr. Lavine: Your Honor didn't give it.

The Court: I certainly gave it, but I will strike it out.

Mr. Lavine: No, no, your Honor. I want that. Withdraw that objection to the instruction No. 22. I didn't notice that you had given it in substance, your Honor. I thought that was refused.

Defendant's Instruction 25 is the instruction relating to the definition of Treasury Decision 5000 referred to in the defendant's contract and necessarily a part of the applicable law for the jurors' consideration.

Mr. Maury: That has already been objected to, Mr. Lavine.

Mr. Lavine: What?

Mr. Maury: That has already been objected to.

Mr. Lavine: Defendant's Instruction 26 is an

instruction that relates to counts 10 and 11 as relates to the $350 item in the theory of the defendant's case; defendant's Instruction 27 relates to the $4,000 item in counts 4 and 5; and are correct statements of the law as to whether the contractor had reasonable grounds to believe it was a fixed fee.

Defendant's Instruction 28 is an instruction on the question of whether Mr. Zap believed that the items were correctly made out by his bookkeeper or accountant and he had a right to rely on that and to be acquitted if he did so rely. [421]

Defendant's Instruction 29 relates to the item of $4,000 as a fixed fee and if the jury so finds they must acquit him.

Defendant's Instruction No. 30 is an instruction as to whether Mr. Zap honestly believed he had a right to carry on experimental work under TD 5000 in advance of receiving a Government contract, and if he acted honestly in that belief they must acquit him.

Instruction 31 is an instruction as to if there was mere error in the item of Daggett Field the defendant must be acquittted of the counts concerned therewith.

Defendant's Instruction 32 is that if the item in the contract for flight test and insurance was a fixed fee in the contract, therefore, it was immaterial how the items were entered in the books because it was a fixed item and it would be their duty to acquit.

The defendant excepts to each and all of these

refused instructions, and the defendant further excepts to the Court's refusal to give a directed verdict on counts 4 and 5 in particular, on the ground that the indictment charges an item of $4,000, whereas the claim is for $4,300; and the indictment charges that the item——

Mr. Maury: This was not included in the motion. We object to the renewal of the motion for directed verdict at this time on different grounds.

Mr. Lavine: But we have a right to. [422]

The Court: I think counsel can put in the record the reasons he assigns. It may have some bearing.

Mr. Lavine: Also the refusal of the Court to direct the verdict on the ground that the item as far as McAvoy is concerned varied from the terms and facts alleged in the indictment.

The defendant also excepts to the refusal of the Court to direct a verdict as to each and all of the counts in the indictment remaining.

I think my record is complete now. Thank you, your Honor.

(Whereupon, the following proceedings were had within the hearing of the jury:)

The Court: Swear a baliff.

How about the exhibits, gentlemen?

Just a moment. How about the exhibits?

The Clerk: We have them here, your Honor, to go up, but I would like to go over them with counsel to be sure that none for identification are taken up into the jury room.

The Court: All right. Swear the bailiff.

(Bailiff sworn.)

(Whereupon, at 3:22 o'clock p. m., the jury retired to deliberate upon their verdict.) [423]

4:30 o'clock p. m.

(The following proceedings were now had without the presence or hearing of the jury:)

The Court: Gentlemen, I have the following request from the jury: "Please, 1: copy of the indictment, and 2: instructions of the Judge to the jury." Signed "Edwin S. Kirk, Foreman." What is your pleasure, gentlemen?

Mr. Lavine: As to the copy of the instructions, your Honor, if your Honor wishes to direct the court reporter to transcribe them and send them up, I certainly have no objections. I concur in that being done. As to the indictment, your Honor, it would seem that the indictment, as it now stands, should not be sent up. I don't see how we can segregate the objections that are withdrawn from the other objections. Mr. Reporter, how long would it take to transcribe the instructions?

The Reporter: Oh, it would take two hours, or more, your Honor.

Mr. Lavine: Does your Honor intend to send the jury to dinner?

The Court: No, not if they get through.

Mr. Maury: The Government feels that sending the indictment to the jury room, due to the obvious fact some of the counts in it have been dismissed; and, in view of counsel's objection to the procedure,

so far as the instructions are concerned, the position of the Government is, we [424] believe, that the State practice should not be followed in this matter. The State practice requires written instructions. I think it is the theory of the Federal practice in criminal cases that while the instructions may be suggested by both the defense and the Government, that the charge to the jury of the Court should be vocal, and such being the case the Government feels that if any instructions are to be read again to the jury, that the jury should be returned into court, and should inform the court on what they wish to be re-instructed, and then the Court should then repeat his charge on those points. We feel that is the time-honored method and that the Federal authorities sustain that position. The statute of California, I haven't it here, but I happen to be familiar with it; it is more or less a recent statute; I think it was enacted about 1935 or '37.

Mr. Lavine: Section 1127-B, your Honor?

Mr. Maury: It provides the instructions may be taken to the jury room.

The Court: 1137.

Mr. Maury: No question about that, but, as I say, the State practice there varies from that of the Federal Courts, or the common law as modified by Acts of Congress, which we are operating under in criminal procedure.

The Court: I am going to call the jury down and explain to them my position, the Court's position, which I have the sanction of both counsel in

with reference to the indictment. [425] And also the fact that it will take two hours, or more, to transcribe the instructions. Is that satisfactory to the Government?

Mr. Maury: Perfectly satisfactory.

The Court: Satisfactory to the defendant?

Mr. Lavine: Yes.

(The following proceedings were now had within the presence of the jury:)

The Court: Let the record show Government counsel, the Court, and defendant's counsel, and the defendant are in court.

Gentlemen of the jury, I have your memoranda:

> "Please, 1: copy of the indictment; 2, instructions of the Judge to the jury." Signed E. S. Kirk, Foreman."

Is that your request, gentlemen?

Jury Foreman Kirk: It is, your Honor.

The Court: Mr. Cross, will you file that with your file?

The Clerk: Yes, your Honor.

The Court: With reference to your request, gentlemen, for the indictment, I do not feel that it is proper to submit the indictment to you for the reason that a large number of the counts have been dismissed and withdrawn from your consideration. And it is the opinion of the Court that [426] they might be confused with some of the other counts, and the language that is in those counts should not be considered at all, and the indictment

being in one instrument I feel, gentlemen, that I should not submit the indictment to you.

With reference to the instructions, both the Government and the defendant are perfectly willing that you should have the instructions. However, the reporter advises me it will take about two hours to get the instructions typed for your consideration. Therefore, in view of that being satisfactory to both the Government and the defendant, if you would indicate to me what part of the instructions you have in mind, I will be very glad to read those portions.

Foreman Kirk: Your Honor, I think under the circumstances that if you would please read the indictment again it would clear up several points. We found in getting in the jury room——

The Court: Don't tell me any findings——

Foreman Kirk: No.

The Court: ——you just ask me what you want.

Foreman Kirk: Yes. It wasn't particularly clear to all concerned as to the difference between Count 1 and Count 3, to start out with.

The Court: Now, let me take care of that first.

"Count I. The Grand Jurors of the United States of America, duly impaneled, sworn and charged in the District Court of the United States for the Southern [427] District of California, Central Division, at the September 1942 Term of said Court, and inquiring for said District, do upon their oaths find and present as follows:

"1. At all times herein mentioned the defendant Edward F. Zap was and is a resident of and was doing business within the Southern District of California, Central Division, under the firm name and style of E. F. Zap Aeronautical Engineers.

"2. At all times herein mentioned the defendant Lloyd Scott was a Lieutenant Commander in the United States Navy and Assistant Chief Inspector of Naval Aircraft, Eleventh Naval District.

"3. At all times herein mentioned the United States Navy was a duly constituted and lawful department and agency of the United States of America, and it was a lawful function and duty of the said Navy to design and test naval airplanes.

"4. The United States of America on or about the 22nd day of March, 1941, and on or about the 15th day of May, 1942, in the City of Los Angeles, State of California, did make and enter into certain contracts with the said Edward F. Zap. Said contracts designated and known as NXs 4105 and 83142 provided among other things that the said Edward [428] F. Zap should engineer, design and build experimental aircraft and aircraft appliances for the United States Navy in consideration of the United States of America to compensate said Edward F. Zap by the payment of a fixed sum or sums for a certain portion or portions of

the work to be done and by the payment of other portions on the basis of cost plus a fixed fee to said Edward F. Zap.

"5. On or about the 23rd day of September, 1942, at Los Angeles, California, and at other places within the jurisdiction of this Court, to the Grand Jurors unknown, all within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully, and feloniously make and present and cause to be made and presented for payment and approval to an officer in the Naval Service of the United States of America a false claim upon and against the Government of the United States, well knowing the same to be false, fictitious and fraudulent, in the manner and by the means hereinafter set forth, to-wit:

"6. On or about the 23rd day of September, 1942, the defendants Edward F. Zap and Lloyd Scott did present to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San [429] Diego, California, who was then and there an officer in the United States naval service, a claim which falsely purported to be for reimbursement for expenses incurred pursuant to the aforementioned contract NXs 4105. Said expenses purported to be for the conducting of certain wind tunnel tests

by the University of Washington, under the terms and provisions of said contracts.

"7. Defendants Edward F. Zap and Lloyd Scott well knew that said claim was false and well knew that said tests had not been performed by the said University of Washington pursuant to contract NXs 4105 or any other contract with the United States Navy. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States."

Now, that is the end of Count 1. Now you ask for the re-reading of Count 3?

Foreman Kirk: Yes, your Honor.

The Court:

"Count III: 12. And the Grand Jurors aforesaid upon their oaths do hereby further indict and present: All of the allegations contained in Paragraphs numbered 1, 2, 3 and 4 of Count I of this Indictment are hereat realleged and incorporated by reference as if here set forth in full.

"13. Prior to the presentment of this Indict- [430] ment and within one year thereof, at Los Angeles, California, and at other places within the jurisdiction of this Court, to the Grand Jurors unknown, and within the Southern District of California, Central Division, defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly, wilfully and feloniously make and use and cause to be made and used a

false bill, receipt, voucher, roll, account, claim, certificate, and affidavit knowing the same to contain fraudulent and fictitious statements and entries in a manner within the jurisdiction of a department or agency of the United States of America, namely, the United States Navy in the following manner and by the following means, to wit:

"14. Prior to the presentment of this Indictment and within one year thereof, defendants Edward F. Zap and Lloyd Scott did apportion and cause to be entered upon the books and records of said Edward F. Zap false entries of and pertaining to sums of money paid to the University of Washington for conducting wind tunnel tests in such a manner as to falsely reflect and falsely represent that said moneys had been paid pursuant to the aforesaid contract NXs 4105 with the United States of America. That said entries upon said books and records were [431] false in that said sums of money had not been paid to the University of Washington, or anyone else, for conducting said wind tunnel tests for the benefit of the United States under said contract NXs 4105, or any other contract to which the United States was a party. That said books and records of said Edward F. Zap were matters within the jurisdiction of the United States Navy, in that by the terms and conditions of said contracts between the United States Navy and said Edward F. Zap, said

books were subject to scrutiny of and inspection by said United States Navy; that defendants well knew that said books and records of Edward F. Zap were to be inspected by the United States Navy for the purpose of determining the costs incurred by said Zap in performing said contracts.

"15. Said defendants Edward F. Zap and Lloyd Scott then and there well know that said book entries were false and that said moneys had not been expended pursuant to said contract NXs 4105, or any other contract to which the United States was a party. All of which is contrary to the statute in such case made and provided and against the peace and dignity of the United States."

Now, that disposes of the indictment, gentlemen. All right. Now, will you indicate to me the instructions? [432]

Foreman Kirk: Well, your Honor, so far as the instructions are concerned, I think we can very well wait for those, and it was merely a matter of clearing up the Counts 1 and 3, which at the time I made a note of here, and I think that very nicely does it.

The Court: Rather than wait for two or three hours, if it is satisfactory to counsel for the Government and the defendant, I will re-read the instructions. Satisfactory, gentlemen?

Mr. Lavine: Yes, your Honor, and perhaps after you do that, if the jury still wants them, we

can have them transcribed and wait until the proper time for them, if they wish them.

Mr. Maury: Satisfactory to the Government, your Honor.

The Court: (At this time the Court re-read his instructions to the jury, and the same having previously been read to the jury are not here incorporated at this time.)

Foreman Kirk: Thank you.

Mr. Lavine: I will stipulate, your Honor, as soon as the reporter gets up the instructions that they may be taken into the jury room.

The Court: Is that satisfactory to the Government?

Mr. Maury: I suppose it is satisfactory to the Government. I think, however, that the jury, now that the instructions have been re-read by the Court, that that is not now necessary. [433]

The Court: Well, if they ask for the instructions, if they are typed, after they are finished I will let them have them.

(Thereupon the jury retired for further deliberations.)

11:12 o'clock p. m.

The Court: Gentlemen of the Jury, have you reached a verdict?

The Foreman: Yes, your Honor, we have.

The Court: Will you stipulate the jury are present, gentlemen?

Mr. Lavine: So stipulated.

Mr. Maury: So stipulated.

The Court: Stipulate the defendant is in court?

Mr. Maury: So stipulated.

Mr. Lavine: So stipulated.

The Court: Let the record show counsel for the Government and counsel for the defendant.

Will you hand it to the bailiff, please?

Mr. Clerk, read the verdict.

The Clerk: (Reading) [434]

"[Title of District Court and Cause.]

DIRECTED VERDICT OF THE JURY AS TO SCOTT

We, the Jury in the above-entitled case, find the defendant Lloyd Scott not guilty on each of the 13 counts of the Indictment.

Dated, Los Angeles, California, April 19, 1943.

Edwin S. Kirk, Foreman of the Jury."

"[Title of District Court and Cause.]

VERDICT OF THE JURY

We, the Jury in the above-entitled case, find the defendant Edward F. Zap: [435]

Guilty as charged in the first count of the indictment.

Not guilty as charged in the third count of the indictment.

Guilty as charged in the fourth count of the indictment.

Guilty as charged in the fifth count of the indictment.

Not guilty as charged in the seventh count of the indictment.

Not guilty as charged in the eighth count of the indictment.

Not guilty as charged in the tenth count of the indictment.

Not guilty as charged in the eleventh count of the indictment.

Dated, Los Angeles, California, April 19, 1943.

Edwin S. Kirk, Foreman of the Jury."

So say all of you, gentlemen?

Jurors: Yes. [436]

Los Angeles, California, Thursday, April 22, 1943. 10:00 A. M.

The Clerk: 15728 Criminal, United States against Edward F. Zap; for sentence on Counts 1, 4 and 5.

Mr. Lavine: At this time, if your Honor pleases, the defendant, Edward F. Zap, moves for a new trial on all of the grounds set forth in the written motion and on the affidavit which is presented this morning, and also moves for arrest of judgment on all of the grounds set forth in the written motion.

If your Honor cares to hear further from Mr. Zap on that, we had such a short time, I would be glad

to put Mr. Zap on the stand and show your Honor the type of wind tunnel report which was received from the University of Washington and which was done by the workers of Mr. Zap, and the fact that we have enough reports in Commander Smith's bomb-proof shelter down there to fill up quite a sizeable space, in corroboration of the statements therein made.

The Court: Well, I thought that those reports were all made available to the defendant the second day of the trial. Were they not?

Mr. Lavine: No, your Honor, we weren't in that position. The matters that we had selected that were portable, as far as letters and documents were concerned, those were made available to us; but at the last time we were down in the bomb-proof shelter we found that all of the reports and [437] the various boxes which were described here were surrounded by a number of large boxes each containing 340 pounds of some kind of ammunition or something which had been stored in the same place, and it was absolutely impossible to get these moved. We were in trial practically every day here, and it was impossible to get at those particular matters which I feel the Court should be cognizant of at this time.

They would be corroborative of all of the statements herein made; that is to say, those particular items are wind tunnel reports of the students and people that were hired by Mr. Zap independently of the university and which were made up pursuant

to private employment rather than through the university. That situation started after Pearl Harbor, when the time of the university will be shown to have dropped from some 900 hours or more per report to about 150 to 200 hours, working over the same tunnel period of time.

I don't believe the books showed those items, your Honor. That was one of the points raised in this case, as to the expenditure by Mr. Zap of monies privately which he had taken with him; and, as a matter of fact, from the indictment, as I intend to point out later in the argument this morning, we were not apprized of the particular items we had to meet, and we did ask for a bill of particulars, which bill was denied to us, so that all we could do as far as the counts of this indictment were concerned, was to guess at what the Government intended to produce, and that guess was largely [438] incorrect in many respects. We were trying to figure out what the Government intended to prove under the indictment.

Now, your Honor, as we come to this phase of the case, and your Honor is the 14th juror, we really have some very serious problems of law and fact to consider, and I will be as brief as I can. In connection with this matter, your Honor, when this case started out it started out on the theory of a conspiracy between Scott and Zap. The Government's whole case proceeded under that evidentiary theory. The indictment alleged both of them jointly, and in connection with that matter the Government charged

them "Lloyd Scott and Edward F. Zap" and then proceeded under this evidentiary conspiracy theory. The evidence was presented through Champlin as to certain supposed conspiracy acts. Each of the counts was infected by that situation. We reached a point in the trial, your Honor, where there was, in fact, no proof as to Scott, and the Court then dismissed Scott and determined to direct the verdict as to Scott.

Now, what position did that leave Mr. Zap in, legally, as well as factually, your Honor? Legally it left him in the position of having been acquitted of a conspiracy as far as Scott is concerned, and in so far as the Government having proceeded on the theory of conspiracy in the entire case it left us in the position where we could not do anything else but leave it alone. The jury had all that evidence before it. Your Honor endeavored in every way to be fair in the [439] determination of the case, and your Honor endeavored in every way to try to balance the situation here, but what was left in the minds of the jury at that particular point? They had a situation there where you could not help but infer that inasmuch as Scott had been freed that Zap was still in the picture, and it left a necessarily serious inference as far as Zap was concerned; and I think the acquittal of one of the co-defendants under the circumstances entitled the other to the acquittal also on all of the counts.

Where there are two co-defendants and they tried on an evidentiary theory of conspiracy in the entire

case, and two defendants only, as here, then if one of the defendants is discharged it entitles the other one to a discharge.

Your Honor, the next point I wish to raise is a question, first, of the indictment itself, and, second, of the evidence in so far as a variance on the counts of the indictment as charged here.

I understood why the jury wanted to have the indictment reread to them, because after rereading it and rereading it it still leaves one in great uncertainty as to what the nature and cause of the accusation is under the Sixth Amendment to the Constitution of the United States. That Amendment, your Honor, is intended to provide a fairness in the preparation of a case which will enable a defendant to be prepared to meet the exact accusation.

Now, Paragraph 6 of the indictment says: [440]

> "On or about the 23rd day of September, 1942, the defendants, Edward F. Zap and Lloyd Scott did present to the disbursing officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California, who was then and there an officer in the United States Naval Service, a claim——"

a single claim

> "——which falsely purported to be for reimbursement for expenses incurred pursuant to the aforementioned contract 4105. Said expenses purported to be for the conducting of certain wind tunnel tests by the University of Washington under the terms and provisions of

said contracts. Defendants Edward F. Zap and Lloyd Scott well knew that said claim was false and well knew that said tests were not performed by said University of Washington pursuant to Contract NXs 4105, or any other contract with the United States Navy."

Now, studying that provision we do not know what claim is intended. Your Honor is familiar with all those bank cases. Your Honor having been Comptroller, knows that where there is a charge of misappropriation of funds or a misstated report that the indictment must charge the particular funds that were misappropriated or the particular report that was misstated; otherwise how can a person be apprized of what he has to meet?

Now, reading this particular section it would appear to [441] me, your Honor, that it intended to refer to the work on the cargo plane, because it says, "well knew that said tests had not been performed by the University of Washington pursuant to Contract NXs 4105 or any other contract with the United States Navy." It concedes under that allegation that tests were made but says that they were not made pursuant to the contract. What else could that refer to except the cargo plane? That was the only thing that we could see that that indictment or that particular clause of the indictment referred to. Did it refer to all of these other things that they were bringing in, in which there was no allegation in the indictment? Your Honor asked the question during the course of the trial in the

early stages, "Was the cargo plane referred to there? Is that in issue here?" And I answered your Honor that it was, it was one of the important issues which the Government contended; and yet we have no allegation in the indictment that tells us that. We didn't actually know until the evidence was presented, your Honor, that that was one of the claims made by the Government against us; that that was one of the accusations which we had to meet. Certainly that particular indictment is too vague and indefinite to inform us of the nature and the cause of the accusation. And then we have the legal situation as far as the jury was concerned that in so far as the cargo plane was at issue, if that is what the Government meant there, and that is all I can take at the present time that they meant [442] under the very specific wording of Paragraph 7 there, that it was referring to some tests; then we were entitled to our requested instruction under TD 5000, which was a part of the issues presented to the Court and the jury in this particular case, and that became more important because the contract incorporates TD 5000 in the contract as a part of the contract.

The law of the case is a matter that the jury must take from the Court, and that was a part of the applicable law which the jury was entitled to have.

Now as to Count 1, your Honor, I believe that your Honor's careful consideration of the evidence as the 14th juror in this case will show that there was no work done that wasn't fairly and justly

charged to the Government and that it was a part of the work which was done pursuant to the contractor's understanding of the contract.

Now as to Counts 4 and 5, your Honor, those are both involving the same item; that is the $4,000.00 transaction with McAvoy.

Now, in the first place, your Honor, we must go back and present one phase of the matter which has been ruled on heretofore, but I deem it advisable to call it to your Honor's attention at this time. The check in that particular case was moved to be suppressed in the evidence on account of it having been illegally taken. The record shows that it was taken on November 5, 1942, separately and independently of [443] any other matters that were taken; that one of the agents of the F.B.I., without any search warrant or other document, went to an employee in Mr. Zap's place and secured the check, and that that check was not taken pursuant to any warrant or any other proceeding; that the check, therefore, should not have properly been in evidence and should not properly have been before the Court; it should have been suppressed.

Now that is the applicable testimony, your Honor, to Counts 4 and 5, and the question arises under this particular point as to whether that testimony is sufficient to sustain the charges contained in Counts 4 and 5.

There is a second point in connection with the charge in Counts 4 and 5, your Honor. Under Section 19 of the indictment the indictment alleges

defendant Edward F. Zap well knew, in fact, said William H. McAvoy had been paid by said defendants the sum of approximately $2,375.00 and no more for the said services pursuant to Contract 83142, and that no other and further expenses had been incurred by said defendants for the services of William H. McAvoy.

Now, that count also charges that the claim was for $4,000.00. That the claim for $4,300.00, and the amount proved by the Government in its own evidence was that the contract not only called for the payment to William H. McAvoy, but also called for the payment of insurance. The evidence adduced shows that at least $2,600.00 or $2,650.00 was paid to McAvoy in connection with his flight test. [444] The evidence further shows that considerable insurance was paid, and while the distribution on the books of that insurance is one thing, the fact of the situation is that there was $135.00 actually paid, there was an obligation incurred for $283.00 additional, there was also the actual expenses of all of the subordinate kinds of insurance which were included in the flight test and which the Kem Company and the books show amount to about $1,100.00 or $1,200.00 in addition to those two items of insurance; so that there was approximately $4,000.00 or $4,500.00, what the exact amount is I do not know, which was expended for that flight test and insurance.

The question arises, your Honor, under the applicable law as to whether an indictment which charges

—I might read another paragraph of Count 5 before I present the argument on that point. The indictment charges in Count 5 that said McAvoy did so endorse the same, referring to the check, and thereafter defendants filled the same in in the figure of $4,000.00. Now, there is no evidence that the defendant ever filled in the figures or ever directed the figure to be filled in in the sum of $4,000.00. There is not one word of evidence in this record to support that. "And thereafter the defendants presented the same to the bank upon which it was drawn for payment." Now, the evidence is contrary to that. It was not presented by the defendants to the bank. And then the indictment does not mention insurance but simply [445] mentions those facts, which, I have stated, the record is quite to the contrary.

So, your Honor, we have two particular points for your Honor's consideration in the matter of the motion for the new trial, and also in the matter of the arrest of judgment. I may say, your Honor, that your Honor has tried this case—there have been many other legal points which occurred which could be presented here and which your Honor considered during the course of the trial; the question of the admission of the books, the question of the failure to permit examination of Mr. Meyers on the issues of the unlawful search and seizure; those have been ruled on and I merely touch on those here at this time.

I may state, your Honor, that we have here a

very serious situation in so far as this defendant is concerned. The case started out, and we might speak frankly about it, with the idea of the Naval Intelligence perhaps after the co-defendant who was acquitted, and the case finally descended upon Mr. Zap as the sole defendant left in the case. I believe that the record shows and your Honor has had the opportunity to observe the great amount of work which this defendant has done for the Government of the United States. In connection with all of these matters he has worked day and night and very diligently, he has put in everything in his whole life in trying to accomplish the things which must be accomplished here, and it is indeed one of those types of [446] cases where I feel that if your Honor, considering all of the points raised heretofore and studying the indictment, studying the different points made here, I feel that justice will have been done if your Honor grants a motion for a new trial, or, not doing that, grants a motion in arrest of judgment for defects in the indictment and in the pleadings in the case and upon the matters herein raised. I feel that on the face of the record, your Honor, that there is, as to Counts 4 and 5, a fatality of proof. The charge as proved is not the charge as laid either in the means or in the amount, and I feel, your Honor, that if your Honor will consider and review in your mind all of the evidence and all of the work that was done here, and the objects which this contractor tried to accomplish, that the ends of justice would be met in such a disposition of the case.

The Court: You will recall, Mr. Lavine, that I called your attention when we discussed your Instruction 25 under TD 5000 that your instruction provided that any experimental work that was done by Edward F. Zap in anticipation of a contract was a proper item chargeable to the Government of the United States. In other words, you asked the Court to instruct the jury that any work that he did in contemplation of a contract, so that the issue was foreclosed if Mr. Zap just said that, "The test I made on that wheel, or some other part of the plane was in anticipation that I might get a contract in six months or a year," and took the matter, as [447] I read your proposed instruction, entirely from the jury. All he would have to say is, "I did that work in anticipation of a contract," leaving nothing at all for the jury under your proposed Instruction 25. In view of the fact that was the only one at this time, because you have saved all of your objections to the instructions that were not given and they are all in the record, but in view of the fact that you called attention to that one instruction I feel that I should reiterate again the position that I took on that, as well as my general objection to the instruction in view of the other instructions which were given in this case which I thought had covered all of the issues. But, as we all know, those are matters for other courts if counsel for the defendant is dissatisfied.

I will hear from the Government.

Mr. Maury: May it please the Court and opposing counsel:

Now counsel attacked Count 1 of the indictment which, as we all know, is framed under Section 80 of Title 18 of the United States Code. The statute more or less has directed the form of the indictment. The statute doesn't concern itself greatly or at all now with whether the money is actually paid or the amount thereof in terms of dollars; it concerns itself with the filing for approval of a false claim. That is alleged in Paragraph 5 very distinctly, in almost the language of the statute: [448]

> "The defendants" and so forth "did feloniously make and present and cause to be made and presented for payment and approval to an officer in the Naval Service of the United States of America a false claim upon and against the Government of the United States, well knowing the same to be false, fictitious and fraudulent, in the manner and by the means hereinafter set forth; that they presented to the disbursing officer a claim which falsely purported to be for reimbursement for expenses incurred pursuant to the aforementioned contract, NXs 4105, said expenses purporting to be for the conducting of ~~certain wind tunnel~~ tests at the University of Washington under the terms and provisions of said contract. The defendants Edward F. Zap and Lloyd Scott well knew that said claim was false, well knew that said tests had not been performed by the University of Washington pursuant to Contract NXs 4105, or any other contract, all of which is contrary to the statute."

Well, your Honor, the claim was presented, the tests had been performed on Project 15, and that was a cargo plane. There was no contract with the United States Navy. It may be a question of law whether or not the Treasury Decision 5000 permits a contractor to do that, but, at any rate, even from said Treasury Decision 5000 I believe the instruction offered [449] by the defendant is an erroneous interpretation of that Treasury Decision 5000, because that doesn't say or doesn't give any contractor a carte blanche right to go and experiment all over the face of the earth and then charge it to a particular contract that he has because he says it may be so charged.

Mr. Lavine: I believe, your Honor, the claim was for $4,300.00. I have been trying to find that.

Mr. Maury: The voucher was for $4,300.00, and attached to it was an invoice for $4,000.00. I stand corrected. The invoice is for $4,300.00, your Honor. The statement attached thereto states that McAvoy was paid $4,000.00 by Check No. 2679.

Mr. Lavine: The invoice, however, was for $4,300.00.

The Court: Motion for a new trial will be denied; exception allowed to the defendant.

Motion in arrest of judgment will be denied; exception allowed to the defendant.

It is the judgment of this Court on Count 1 that a fine shall be imposed of $2,000.00, and nine months in the County Jail; on Count 4, a fine of $2,000.00

and nine months in the County Jail; on Count 5, a fine of $2,000.00 and nine months in the County Jail; the County Jail sentences to run concurrently and not consecutively.

It is the further order of this Court that should an appeal be taken that the defendant be required to pay to the [450] clerk in escrow one-half, or the sum of $3,000.00. Under Rule 5 of the Supreme Court Rules of the United States in criminal proceedings, the statute provides that all of the fine the Court may require to be paid. [451]

EXCEPTIONS

1. The defendant excepts to the order of the District Court overruling the demurrer to the indictment.

2. The defendant excepts to the order of the District Court overruling the demurrer to the indictment on each and every ground thereof as to Counts 1, 4 and 5.

3. The defendant excepts to the order of the District Court in refusing the defendant a bill of particulars.

4. The defendant excepts to the order of the District Court in refusing the defendant the right to inspect the minutes of the Grand Jury to determine whether there has been an indictment based upon evidence in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

5. The defendant excepts to the order of the District Court on March 11, 1943, denying the defendant's motion to suppress the evidence and ordering of the same returned to the defendant.

6. The defendant excepts to the sufficiency of the affidavits in support of purported search warrants and to the ruling of the District Court holding that the said affidavits were sufficient. [452]

7. The defendant excepts to the order of the District Court in refusing to suppress and return a check for $4,000.00 on November 5th, from an employee of Edward F. Zap, to wit, F. O. Boyle, and in refusing to suppress the same in evidence.

8. The defendant excepts to the order of the District Court in refusing to allow Edward F. Zap to present oral testimony in behalf of his motion to suppress the evidence.

9. The defendant, Edward F. Zap, excepts to the refusal of the District Court to accept an offer of proof of the defendant herein as to the testimony that Murray B. Myerson and James C. Sloane, Department of Justice agents and in refusing to permit them to be called to the witness stand.

10. The defendant excepts to the order of the District Court granting a motion to strike the offer of proof of what the testimony of Myerson and Sloane would show as to their unlawful search and seizure of the offices and files of Edward F. Zap.

11. The defendant excepts to the order of the District Court in holding that the search warrants, which were based upon the unlawful search, could be used for the purpose of seizing the books and

records of Edward F. Zap. [453]

12. The defendant excepts to the order of the District Court in permitting evidence secured on a second search following a first illegal search to be used in evidence and in refusing to suppress the said evidence.

13. The defendant excepts to the order of the trial court in overruling defendant's objections that he was denied rights guaranteed to him under the Fifth Amendment to the Constitution of the United States.

14. The defendant excepts to the order of the District Court in refusing a continuance to the defendant in order to prepare his defense.

15. The defendant excepts to the order of the District Court in declining to order the return to the defendant until the date of the trial of all books, papers and documents which were in the possession of the Government.

16. The defendant excepts to the order of the District Court in denying defendant's motion to compel the Government to elect at the outset of the trial on what counts the Government was proceeding and in permitting a multiplicity of counts against the defendant as to each transaction and in splitting up the prosecution.

17. The defendant excepts to the order of the trial Judge in discharging juror number Two outside of the hearing of the defendant, and without his personal [454] consent and waiver.

18. The defendant excepts to the order of the trial court in refusing to strike Government Exhibit Number 7, to wit, a check for $4,000.00.

19. The defendant excepts to the order of the trial court in refusing to permit oral testimony to be taken during the trial regarding the illegal manner in which the Government's Exhibit No. 7 was procured and in refusing to entertain a motion during the trial to strike the said evidence and suppress it.

20. The defendant excepts to the order of the trial court in overruling the defendant's offer of proof during the trial as to the illegal search and seizure of the premises of Edward F. Zap and the illegal securing of the check for $4,000.00.

21. The defendant excepts to the order of the District Court in rejecting his offer of proof and denying his motion to strike the said evidence.

22. The defendant excepts to the order of the trial court admitting the testimony of various witnesses from the books so illegally searched and seized.

23. The defendant excepts to the order of the District Court permitting the identification of all the books, checks and records unlawfully seized in violation [455] of the Fourth and Fifth Amendments to the Constitution of the United States, and thereafter identified and offered in evidence.

24. The defendant excepts to the order of the District Court in permitting testimony from each of the items so designated.

25. The defendant excepts to the order of the District Court in denying the defendant's motion to compel the Government to elect on each and every

one of the counts in the indictment and in permitting the issues to go to the jury in duplicate, involving the same transaction under the same statute.

26. The defendant excepts to the order of the District Court denying the defendant's motion for a directed verdict.

27. The defendant excepts to the order of the District Court denying the defendant's motion to dismiss on the grounds of fatal variance between the pleadings and the proof.

28. The defendant excepts to the order of the District Court in overruling defendant's request to examine the Grand Jury transcript from which Government counsel was attempting to impeach defense witness McLaughlin.

29. Defendant excepts to the order of the District Court in admitting into evidence over defendant's ob- [456] jections all of the documents illegally searched and seized.

30. The defendant excepts to the order of the District Court in overruling the defendant's motion to instruct the jury to disregard the books and records seized, as irrelevant, incompetent, and immaterial.

31. The defendant excepts to the order of the trial court in declining to quash the indictment on the ground that the Grand Jury which indicted the defendant was not constituted in accordance with the provisions of Title 28, Section 411, U. S. Codes Annotated, and in granting the peal in abatement.

32. The defendant excepts to the order of the

District Court overruling objections of the defendant to the jurisdiction of the court to proceed on the ground that he was deprived of due process of law.

33. The defendant excepts to the order of the trial court in failing to direct the verdicts as to each count.

34. The defendant excepts to the order of the District Court in instructing the jury that it is proper for them to take into consideration the defendant's interest in the case and in singling him out for consideration.

35. The defendant excepts to the order of the Dis- [457] trict Court in instructing the jury that one is guilty of wilful filing of a claim where his "conduct is marked by a careless disregard as to whether or not the thing done is lawful."

36. The defendant excepts to the order of the District Court in overruling the defendant's motion for a directed verdict as to Counts 4 and 5 on the grounds that there was no proof of any claim of $4,000.00.

37. The defendant excepts to the order of the District Court in stating to the jury that it may disregard a portion of the indictment.

38. The defendant excepts to the order of the District Court in refusing to give defendant proper instruction on Treasury Decision 5000, which was a part of the contract.

39. The defendant excepts to the refusal of the District Court to give defendant's instruction No.

12, which points out that the gravamen of the charge is the element of wilfulness. That even though a claim, which is in fact false or erroneous, if present inadvertently through mistake or lack of knowledge, is not a false claim within the meaning of the law.

40. The defendant excepts to the refusal of the Court to give defendant's proper instruction No. 3. [458]

41. The defendant excepts to the District Court's refusal to give defendant's instruction No. 7.

42. The defendant excepts to the District Court's refusal to give defendant's instruction No. 9 as to good faith.

43. The defendant excepts to the District Court's refusal to give defendant's instruction No. 11 as to each count being considered separately.

44. The defendant excepts to the District Court's refusal to give defendant's instruction No. 12.

45. The defendant excepts to the District Court's refusal to give defendant's instruction No. 13.

45. The defendant excepts to the District Court's refusal to give defendant's instruction No. 14.

46. The defendant excepts to the District Court's refusal to give defendant's instruction No. 17

47. The defendant excepts to the District Court's refusal to give defendant's instruction No. 19.

48. The defendant excepts to the District Court's refusal to give defendant's instruction No. 19a.

49. The defendant excepts to the District Court's refusal to give defendant's instruction No. 18a.

50. The defendant excepts to the District Court's refusal to give defendant's instruction No. 20. [459]

51. The defendant excepts to the District Court's refusal to give defendant's instruction No. 21.

52. The defendant excepts to the District Court's refusal to give defendant's instruction No. 22.

53. The defendant excepts to the District Court's refusal to give defendant's instruction No. 25.

54. The defendant excepts to the District Court's refusal to give defendant's instruction No. 26.

55. The defendant excepts to the District Court's refusal to give defendant's instruction No. 27.

56. The defendant excepts to the District Court's refusal to give defendant's instruction No. 28.

57. The defendant excepts to the District Court's refusal to give defendant's instruction No. 29.

58. The defendant excepts to the District Court's refusal to give defendant's instruction No. 30.

59. The defendant excepts to the District Court's refusal to give defendant's instruction No. 32.

60. The defendant excepts to the District Court's refusal to give each and all of the other instructions offered by the defendant.

61. The defendant excepts to the District Court's refusal to grant a new trial on the grounds that the Fourth and Fifth Amendments to the Constitution of the United States were violated.

62. The defendant excepts to the District Court's [460] refusal to grant the motion in arrest of judgment.

63. The defendant excepts to the trial court's pronouncing of judgment and sentence.

MORRIS LAVINE

Attorney for Appellant. [461]

[Title of District Court and Cause.]

ORDER APPROVING BILL OF EXCEPTIONS

An order approving the Bill of Exceptions having been presented to this Court, and the Bill of Exceptions having been amended to correspond with the facts, and the Government and the defense having stipulated that the original exhibits shall be transmitted to the Ninth Circuit Court of Appeals and made a part of the record, and the same having been ordered and approved by the Ninth Circuit Court of Appeals, the said Bill of Exceptions, including such original exhibits as stipulated to, is now settled, signed, engrossed and made a part of the records within the term and within the time fixed by the United States Circuit Court of Appeals for the Ninth Circuit, together with the complete transcript of the testimony.

Dated: December 20, 1943.

J. F. T. O'CONNOR
United States District Judge

[Endorsed]: Lodged Oct. 25, 1943.

[Endorsed]: Filed Dec. 20, 1943.

[Endorsed]: No. 10419. United States Circuit Court of Appeals for the Ninth Circuit. Edward F. Zap, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 14, 1944.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Ninth Circuit Court of Appeals
of the United States of America

No. 10419

EDWARD F. ZAP,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ASSIGNMENT OF ERRORS

The aggrieved by the decision, determination, judgments and proceedings had in the District Court of the United States, Southern District of California, Central Division, Edward F. Zap, Appellant herein, assigns the following errors in the proceedings and trial and judgments against him, which he avers occurred prior to and during the trial of the cause; said errors and each of them are to the great detriment, prejudice and injury of the defendant and appellant, and in violation of the rights conferred upon him by the Constitution and statutes of the United States of America, said errors are as follows:

ASSIGNMENTS OF ERROR

The Appellant assigns the following errors in the record:

1. The District Court erred in its decision overruling the defendant's demurrer to the indictment, and particularly the Counts 1, 4 and 5, on the grounds that counts 1, 4 and 5 failed to specify a public offense against the laws of the United States.

2. The District Court erred in its decision in holding that the indictment as to counts 1, 4 and 5 were not so vague, indefinite and uncertain as to fail to state a public offense, and erred in holding that the said indictment in each of the said counts apprised the accused of the nature and cause of the accusation so that he could meet it on the trial.

3. The District Court erred in its decision that the indictment in count 1 was sufficiently specific to enable the accused to know what claim or claims it is alleged that the defendant presented for payment and approval to an officer in the Naval Service, well knowing the same to be false, fictitious and fraudulent.

4. The District Court erred in its decision in holding that it was not necessary to specify the name of the officer and person or persons in the Naval Service to whom such a false claim was allegedly presented.

5. The District Court erred in its decision in failing to specify what claim was purported to be for reimbursement for expenses incurred, and for what the expenses were to be incurred, in conduct-

ing certain wind tunnel tests for the University of Washington.

6. The District Court erred in its decision in holding that it was not necessary for the Appellee to specify with definiteness and certainty the facts necessary to set forth the charges alleged in the indictment.

7. The District Court erred in its decision in overruling the demurrer to the indictment on each and every ground thereof as to counts 1, 4 and 5.

8. The District Court erred in refusing the defendant a bill of particulars as requested.

9. The District Court erred in refusing to grant the plea in abatement on the ground that the women were excluded from the Grand Jury.

10. The District Court erred in holding that the indictment did not, by reason of its vagueness and indefiniteness, violate the Fifth Amendment to the Constitution of the United States.

11. The District Court erred in its decision in failing to hold that the indictment by reason of its vagueness, indefiniteness and uncertainty, did not violate the Sixth Amendment to the Constitution of the United States.

12. The District Court erred in refusing to suppress the evidence on the grounds of its unlawful search and seizure.

13. The District Court erred in holding that the affidavit in support of the purported search warrants were sufficient upon which to base a search

and seizure under the Fourth and Fifth Amendments to the Constitution of the United States.

14. The District Court erred in refusing to allow the Appellant to produce oral testimony of F.B.I. Agents on the matter of the unlawful search and seizure.

15. The District Court erred in admitting in evidence and in refusing, during the course of the trial, to strike the testimony relating to a check for $4,000.00 unlawfully searched and seized in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

16. The District Court erred in refusing to permit the defendant to take oral testimony in the course of the trial regarding the unlawful search and seizure of the $4,000.00 check.

17. The District Court erred in admitting books and records in evidence over the objections that they were obtained in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and in refusing to suppress this evidence, and in refusing to order the return of said books and records to the Appellant under the Fourth and Fifth Amendments to the Constitution of the United States.

18. The District Court erred in the refusal to permit the filing of an offer of proof of the defendant herein as to the testimony of Murray B. Myerson and James C. Sloane, Department of Justice agents, regarding their unlawful search and seizure of a check for $4,000.00 which was used in evidence

against the Appellant under Counts 4 and 5 of the indictment.

19. The District Court erred in declining a continuance to the defendant at the outset of the trial to prepare his defense.

20. The District Court erred in denying defendant's motion at the outset to elect on what counts the Government was proceeding, and in permitting the Government to proceed on a multiplicity of counts against the defendant as to each transaction, and in splitting up the prosecution, on the grounds that this violated the defendant's rights under the Fifth Amendment to the Constitution of the United States and the statutes and holdings of the courts.

21. The District Court erred in excusing a juror outside of the hearing of the defendant, and without his personal consent and waiver.

22. The District Court erred in refusing to strike the Government's Exhibit No. 7, to wit, a check for $4,000.00.

23. The District Court erred in overruling the defendant's offer of proof during the trial as to the illegal search and seizure of the premises of Edward F. Zap, and the illegal securing of the check for $4,000.00.

24. The District Court erred in admitting the testimony of various witnesses from books illegally searched and seized from the premises of Edward F. Zap.

25. The District Court erred in refusing to com-

pel the Government to elect as to only one count on each transaction alleged in duplicate form.

26. The District Court erred in denying the motions of the defendant for a directed verdict.

27. The District Court erred in overruling the defendant's motion to instruct the jury to acquit on the grounds of variance between the pleadings and the proof.

28. The District Court erred in refusing to allow defense counsel to examine the Grand Jury transcript of the witness McLaughlin during the trial of the case and when the Government sought to impeach McLaughlin by his testimony before that body.

29. The District Court erred in admitting the books and records over objections that they were illegally searched and seized.

30. The District Court erred in instructing the jury that it may disregard that portion of the indictment referring to Lloyd B. Scott.

31. The District Court erred in overruling the defendant's objections to the admissibility of books and records on the ground that they were irrelevant, incompetent and immaterial, and that he had no knowledge of their contents.

32. The District Court erred in instructing the jury that it is proper for the jury to take into consideration the defendant's interest in the case, and in singling him out for consideration, to which exception was duly noted.

33. The District Court erred in instructing the

jury that one is guilty of a willful filing of the claim where "his conduct is marked by a careless disregard as to whether or not the thing done is lawful."

34. The District Court erred in refusing to give the defendant's proffered instruction as follows:

> "You are instructed that T.D. 5,000, which is a provision in the contracts between Edward F. Zap and the United States Government, provides as follows:
>
> '(d) Other manufacturing cost.—Other manufacturing cost as used in paragraph (b) of this section includes items of manufacturing costs which are not properly or satisfactorily chargeable to factory costs (see paragraph (c) of this section) but which upon a complete showing of all pertinent facts are properly to be included as a cost of performing the contract or subcontract, as for instance, payments of royalties and amortization of the cost of designs and patent rights over their useful life; and 'deferred' or 'unliquidated' experimental and development charges. For example, in case experimental and development costs have been properly deferred or capitalized and are amortized in accordance with a reasonably consistent plan, a proper portion of the current charge, determined by a ratable allocation which is reasonable in consideration of the pertinent facts, may be treated as a cost of performing the contracts or subcontract. In the case of

general experimental and development expenses which may be charged off currently, a reasonable portion thereof may be allocated to the cost of performing the contract or subcontract. If a special experimental or development project is carried on in pursuance of a contract, or in anticipation of a contract which is later entered into, and the expense is not treated as a part of general experimental and development expenses or is not otherwise allowed as a cost of performing the contract, there clearly appearing no reasonable prospect of an additional contract for the type of article involved, the entire cost of such project may be allowed as a part of the cost of performing the contract.'

"Under the terms of this provision of the contract you are instructed that any experimental work done by Edward F. Zap in anticipation of a contract is a proper item chargeable to the Government of the United States."

To which exception was duly noted.

35. The District Court erred in refusing to give the defendant's following proffered instruction:

"You are instructed that if Edward F. Zap honestly believed that he had a right to carry on experimental work under the terms and provisions of Treasury Department 5,000 in advance of receiving a Government contract, and if you believe that he otherwise charged the

Government only what he honestly believed to be due under the provisions of Contract NXs-4105, you must acquit him of Counts I and III of the Indictment."

To which exception was duly noted.

36. The District Court erred in refusing the following defendant's proffered instruction:

"If you find from the evidence that the charge for the flight test was for the flight test and insurance, and that the item of $4,000 was a fixed fee, or that Edward F. Zap had reasonable grounds to believe that it was a fixed fee, you must acquit him of Counts IV and V of the Indictment."

To which exception was duly noted.

37. The District Court erred in refusing the following defendant's proffered instruction:

"You are instructed that in Count I of the Indictment, it is alleged that on or about the 23rd day of September, 1942, the defendants Edward F. Zap and Lloyd Scott did unlawfully, knowingly and wilfully make and present, and cause to be made and presented for payment and approval to a naval officer, a false claim, well knowing the same to be false, fictitious and fraudulent. It is alleged in said count that the claim falsely purported to be for reimbursement for expenses incurred pursuant to Contract No. NXs 4105, and the Government charges that these tests were not performed pursuant to this

contract or any other contract with the United States Navy.

"If you find from the evidence that wind tunnel tests were made by Edward F. Zap at the University of Washington, pursuant to contracts with the United States Navy, and that the said experiments so conducted were a necessary part called for in the contracts with the Navy, or were a necessary development growing out of the work for the Navy, you must acquit Edward F. Zap."

To which exception was duly noted.

28. The District Court erred in refusing the following proffered defense instruction:

"The intent of the defendant under the provisions of the law pursuant to which this prosecution is conducted is a material element necessary to prove the offense, and in arriving at a decision on that question all the facts and circumstances shown in the case as to the conduct of the defendant should be considered. If a man makes a claim which does not properly exist, but it appears that he had reasonable grounds to believe that the claim was as he stated it, such statements and conduct are to be taken into consideration by you in determining whether they were innocent misstatements and were made in good faith. If such claims or statements, alleged to have been falsely and fraudulently made, were made in good faith and the defendant believed at the time that they

were correct, or had reason to believe them to be correct, you must acquit him."

To which exception was duly noted.

39. The District Court erred in refusing the following proffered defense instruction:

"The submission of items to the Navy for its cost inspection is not a claim within the meaning of the statute. Nor is the approval thereof by the Navy a claim within the meaning of the statute. It is only the final voucher claim for bill which is presented after all of the inspection and audit is made that is the claim upon which the Government may base the charge of presenting a false claim, and if such a claim was made only after due audit and inspection by the Navy itself and the accused had seen the approval by the Navy cost inspector of the item, and relied upon it as a certification that the claim was true and correct, even though the naval cost inspector was in fact mistaken, you must acquit the accused."

To which exception was duly noted.

40. The District Court erred in refusing the following proffered defense instruction:

"Where the accused had a right to rely on the accuracy of his own auditor, and also to rely on the accuracy of the inspection of a United States cost inspector, if you find that he did so rely upon the conduct of either or both and

acted in good faith in reliance on their conduct and inspection, you must acquit the accused."

To which exception was duly noted.

41. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that a contractor has a right to rely on the system and procedure which the Government follows in the handling of its claims, and he has a right to rely on the fact that any bills or requests for funds in a cost plus fixed fee contract must be first audited, inspected and approved by Navy cost inspectors, and if you find that Edward F. Zap relied on such inspection and his belief in the accuracy of the approval of the Navy cost inspector, then you must acquit him of such charge or charges on which he so relied, even though in fact the cost inspector approved an erroneous item."

To which exception was duly noted.

42. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that a contractor has a right to rely on his employees and his belief in the regularity of their transaction. It is a presumption of law that business transactions are regularly performed and carried out, and the contractor has a right to rely on this presumption, and if you find that Edward F. Zap relied on the presumption that his employee or employees were properly carrying out their work and making proper entries and proper check on

the accounts, you must acquit him, even though it may be that he certified to some account or accounts as being correct when in fact they may have been incorrect. The law does not seek to punish a contractor for mere mistake of his employees or their inefficiency, but only provides that if a claim is wilfully false to the knowledge of the contractor, and the contractor has submitted a wilfully false claim with a design to cheat and defraud *the*

"If you find in this case that Edward F. Zap had no intention to present a false claim, then you must acquit him, even though some item or items might be false or incorrect in fact."

To which exception was duly noted.

43. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that by making a claim as defined in the statute, is meant the asking or demanding on the part of the defendant from the Government of payment for services. It is not the preliminary request for audit or inspection and approval of the items that constitutes the making of a claim, but it is the actual claim itself after the same has been submitted for audit and approval and submitted to the Navy Department for payment, that constitutes the claim within the meaning of the statute.

United States v. Bittinger, 24 Fed. Cas. No. 14599."

To which exception was duly noted.

44. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that it is no offense under the statute to make a claim upon the Government for the payment of a demand that is without merit, unless the person who makes it understands at the time it is made that it is a false, fictitious or fraudulent demand and is therefore intended to defraud the Government."

United States v. Route, 33 Fed. 246."

45. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that you must not compromise your verdict as to some counts for other counts."

To which exception was duly noted.

46. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that a cost-plus-a-fixed-fee contract is somewhat analogous to a partnership. Under such an agreement the contractor and the Government work together for the attainment of the object of the contract. Such contracts are not let upon bid to the lowest bid, as was customarily the case during past time. Instead of the bid method of letting a contract, the Government, when using the cost-plus-a-fixed-fee method of contracting consummates the agreement by negotiation. In many cases the contract will be between two or

more separate contracting firms acting jointly on the one hand, and the Government on the other. Again, under the cost-plus-a-fixed-fee contract the Government exercises constant control and supervision of the work during the entire life of the project. When the work is commenced the contractor may not even know the exact details of all the work to be done. It is a fact that in a great many of these contracts the contractor knows only the location and the general type of the work to be undertaken. Exact specifications are worked out as the work progresses. This is the antithesis of the procedure where the contract is upon a fixed fee. In the latter case the Government takes no supervisory interest in the contract. It lets the contract for a fixed price. When the work is completed and accepted the contractor is paid the fixed price and it is immaterial how much the contractor has paid for the work to be done for the Government must, in any event, pay the fixed price when the work is completed.

"In a fixed price contract there is no relationship even remotely resembling a partnership between the Government and the contractor. Rather, the relationship is more nearly that of vendor and vendee. In such a case the Government is only concerned with the fact that the work has been done according to the fixed fee.

"The Government uses the fixed fee type of

contract generally in cases where it desires the speediest method of accomplishing the desired work. The cost-plus-a-fixed fee contract is one in which the Government lets certain work to a contractor and in effect says to the contractor, 'You do the work, we will pay all costs of performance, and in addition, we will pay you a certain fixed fee.' In the case of fixed fee contracts no Government supervision is necessary, and the contractor has a right to bill the Government for the fixed fee.

"In the case of a cost-plus-a-fixed-fee contract the Government audits and re-audits and makes checks of it before payment is made.

"If you find from the evidence that any of the accounts charged in the indictment were fixed fee accounts, or if you find that the contractor reasonably believed they were fixed fee accounts and charged them as such you must acquit him, if his claim was as to the fixed fee amount.

"If you find from the evidence that the contractor, in filing a claim on accounts which were cost plus, did so based upon his belief as to the accuracy of the audit and inspection of his own auditor, as well as an audit and inspection by auditors acting for the United States Government, and that he believed their audits represented a truthful and accurate check of the accounts, then you must acquit Edward F. Zap in this case."

To which exception was duly noted.

47. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that mistakes of fact, or errors of fact, which were not committed wilfully and corruptly, but which may have been either the result of negligence or carelessness in coming to that belief or conclusion of the mind, without taking proper pains to enable the accused to ascertain the correctness of the claim, do not make the claim corrupt, and such claim cannot be wilful or corrupt where the claim is according to the belief and conviction of the accused as to its correctness at the time he made it. Even if you find that the accused may have filed a claim rashly and inconsiderately, as to what they believed to be true, the claim would still not be wilfully false.

People v. Von Tiedeman, 120 Cal, 128, 136, 137;

United States v. Shellmire, Bald. 370.

To which exception was duly noted.

48. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that you must take into consideration the fact that auditors and bookkeepers were charged with the duty of examining and inspecting the accounts, and advising Mr. Zap of their correctness, and you may take that into consideration in determining whether his acts were wilfully or corruptly done, or whether they were in good faith and to the best

of his knowledge and belief, and if you find from the evidence that they were in good faith and that he acted to the best of his knowledge and belief, you must acquit the accused."

To which exception was duly noted.

49. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that before the person charged can be convicted of wilfully filing a false claim the Government must prove beyond a reasonable doubt that the accused presented the claim with the conscious knowledge that it was not true, and with the intent that it would be received as a statement of what was true in fact; well knowing that it was not true. To do a thing wilfully is to do it by design, with set purpose. It is incumbent upon the Government to prove the wilful element.

People v. Von Tiedeman, 120 Cal. 128, 135;
People v. Sheldon, 68 Cal. 434."

To which exception was duly noted.

50. The District Court erred in refusing the following proffered defense instruction:

"The accused cannot be guilty of wilfully presenting a false claim where the claim is according to the belief and conviction of the accused as to its truth, and if you find from the evidence that the accused did not wilfully present a false claim, or if you have a reasonable doubt as to whether it was or was not wilful,

you must acquit the accused. In other words, if you find that the claim presented was according to the belief and conviction of the accused as to its truth, even though in fact it was erroneous, you must acquit the accused.

People v. Von Tiedeman, 120 Cal. 128, 137."

To which exception was duly noted.

51. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that if you believe that Edward F. Zap at all times acted in good faith and believed that his claims, accounts or statements were true and correct, you must acquit him, even though he may have been mistaken.

United States v. Route, 33 Fed. 246.

"Where a person accused has acted in good faith, such a claim is not false or fictitious or based upon fraud, and if you find that the defendant Edward F. Zap acted in good faith you must acquit him.

6 Alaska, p. 736."

To which exception was duly noted.

52. The District Court erred in refusing the following proffered defense instruction:

"You are instructed that the item in the contract for flight test and insurance was a fixed fee, and therefore it was immaterial how the items were entered in the books, because it was a fixed item which the Government had to pay under the terms of the contract; therefore if

you so find, it is your duty to acquit the defendant Edward F. Zap of Counts IV and V of the Indictment."

To which exception was duly noted.

MORRIS LAVINE
Attorney for Appellant

Received copy of the within Assignment of Errors this 25th day of October, 1943.

JAMES E. HARRINGTON,
per GRM
GEORGE R. MAURY
Special Assistants to the Attorney General

[Endorsed]: Filed Oct. 25, 1943. Edmund L. Smith, Clerk.

[Endorsed]: Filed Feb. 15, 1944. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

POINTS UPON WHICH APPELLANT INTENDS TO RELY

Appellant herewith adopts as points upon which he intends to rely in his appeal each and all of the points set out in his Assignment of Errors, and matters excepted to in the accord.

Dated: February 18, 1944.

MORRIS LAVINE
Attorney for Appellant

Received copy of the within this 19 day of February, 1944.

CHARLES H. CARR
United States Attorney
By JAMES McCARTY
Ass't United States Attorney

No. 10419

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD F. ZAP,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title of Circuit Court of Appeals and Cause.]

NOTICE OF MOTION

To Special Assistant to the Attorney General, James E. Harrington, and Special Attorneys George R. Maury and Walter S. Binns:

Please Take Notice that on July 8, 1943, at the hour of 10:00 a.m., or as soon thereafter as the motion can be heard, the appellant in the above-entitled case will move the Ninth Circuit Court of Appeals of the United States, on the third floor of the Post Office Building in San Francisco, California, for an order to remand this case to the District Court of the United States, Southern District of California, Central Division, for further proceedings and for the taking of further evidence on a motion for a new trial, based upon evidence discovered since the trial of Edward F. Zap in said District Court. That the nature of said newly discovered evidence is as follows:

That a document presented to the court in support of the Government's contention that a false claim was presented in the sum of $4,000.00, was forged by a disgruntled employee in Mr. Zap's organization; that said forgery consists of typewritten matter, typed over the signature of appellant, who had signed his name in blank to papers to be used in filing routine reports on technical matters; that this document was presented in the trial of the case as part of Government's Exhibit 19, and that affiant did not ever see said document, as typed, before the trial of his case; that he was almost the last witness in the trial of the case, which

was conducted from 9:00 o'clock in the morning until 6:00 and 7:00 o'clock in the evening each day, and that the forgery and proof of the forgery was not discovered until after the trial had concluded and the appeal was taken.

That this supporting document was used to convict appellant and forms the basis of his conviction.

That all of appellant's papers and records were kept in the custody of Commander Smith of the United States Navy and appellant did not have access to all of his papers and files for a period of ten days before the trial commenced; that since the trial concluded he has been able to gather other proof and data showing that his conviction was based on forged testimony, and that the matters presented upon which he was convicted were false, forged and manufactured by persons in his employ who were hostile to appellant.

That all of these matters and the proof thereof are newly discovered and that appellant could not have presented them to the trial court at the time of trial. That in support of these matters appellant has engaged the services of Lawrence J. Buys, an expert on questioned documents, and attaches to this motion the affidavit of said Buys, which is made a part hereof.

Appellant therefore gives notice that he will ask the Ninth Circuit Court to remand the case to the United States District Court and to stay all proceedings in the Circuit Court of Appeals pending the decision and hearing in said District Court on

the motion for a new trial, and should the motion be granted, that the appeal then be dismissed, and should it be denied, that appellant complete his record on appeal thirty days after the ruling on the motion for a new trial.

MORRIS LAVINE,
Attorney for Appellant

Received copy of the within Affidavit this 3rd day of July, 1943.

UNITED STATES GOVERNMENT
By JAMES E. HARRINGTON,
Spec. Asst. to the Atty. Gen.

[Endorsed]: Filed July 6, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF EDWARD F. ZAP

State of California,
County of Los Angeles—ss.

Edward F. Zap, being first duly sworn, deposes and says:

That he is the appellant in the above-entitled case. That the time within which appellant must lodge his bill of exceptions is set for July 15, 1943, and the time within which the same must be settled and filed is set by this court for July 30, 1943.

That affiant stands convicted of presenting a claim for $4,000 to the Navy falsely purporting to be for expenses incurred in connection with gov-

ernmental contracts, and with presenting a false and fraudulent statement to the Government in reference to this $4,000 item. That affiant was a contractor with many hundreds of claims for items of expenditure which were filed during the course of his business of doing aeronautical research for the United States Navy.

That during the trial of the case the Government presented and offered in evidence as a part of Government's Exhibit 19, a letter purporting to have come from appellant, which read as follows:

> "I, Edward F. Zap, do hereby certify that I have paid to William McAvoy the sum of Four Thousand and No/100 dollars ($4,000.00), as payment for Flight Testing of OS2U-2 under terms of Contract Nos. 83142, this being paid by my check #2679, dated 9-23-42.
>
> "EDWARD F. ZAP."

That since the trial of the action on which this appeal is based and the pronouncement of judgment, affiant has discovered that this document, which was relied on by the Government to form the basis of his conviction as to counts 4 and 5 of the indictment, is a forgery, and was manufactured and presented to the Government falsely to bring about his conviction.

That affiant did not see this document with the typing on it at any time before the trial of his case; that he recognized his signature, but none of the typing or any matters contained in the typing; that he first examined this document for the first

time when he was on the witness stand as one of the last defense witnesses in the case on April 16, 1943, and almost at the conclusion of the evidence, there being only one other witness, on either side, who testified briefly after affiant's testimony. That during the cross-examination affiant was asked to look at the document, which he then saw for the first time, and he testified as follows:

Q. Now, calling your attention to Government's Exhibit 19 in evidence, and to the last page thereof, is that your signature?

A. The signature looks like mine.

Q. Did you write it?

A. It looks like my signature, so I must have, but I want to call attention it looks strange to me.

Q. That paper looks strange?

A. This is what we're using in the stress reports. This is not our standard paper which we use for any kind of work.

Q. But it did come from your office?

Calling your attention to the document next before that in the same exhibit, is that your signature? A. This is my signature?

Q. Calling your attention to the document next before that, is that your signature?

A. Yes, this is my signature.

Q. And to the back of the document next before that, are those your signatures in two places?

A. Those are my signatures.

Q. Calling your attention to the front of the document, is that your signature?

A. Yes, this is my signature. May I see that?

This is definitely paper we use in the stress department.

Q. That is indicating the last sheet in the exhibit?

A. The last sheet. Which I usually, when I go on a trip, sign ahead of time for the stress department to fill its reports and send anything back to Washington.

Q. Do you wish to testify now that you did so sign that before it was filled in?

A. There is another thing that appears to me, October 13th. Any certification I made in the middle of summer was notarized by a notary public. We established a notary public right in our office. And that is missing on the document.

Q. But you wish to testify that you did or did not sign it before it was typed in?

A. Well, I merely report the facts as they appear to me.

Q. Yes?

A. It looks like my signature, and I suspect that that signature was put on that paper for the stress department and somebody has used that paper.

Q. You suspect that? A. I suspect it.

Q. Now that is your testimony.

(Rep. Tr. p. 1586 line 18 to p. 1588 line 11.)

That this testimony was given on the last day of the taking of evidence in the trial, and that the trial was conducted each day from 9:00 in the morning until 6:00 to 7:00 in the evening.

That since the conclusion of the trial affiant has extensively investigated this document and has em-

ployed Lawrence J. Buys, Examiner of Questioned Documents, to examine said document; that the document shows clearly that affiant's name was first written on the same and that the other matters therein were forged; that a copy of an affidavit by said Lawrence J. Buys is attached herewith and made a part hereof by reference, verifying these facts.

That affiant had certain employes in his concern who were endeavoring to get affiant into trouble, hoping thereby to gain control of his business enterprise, and that he so testified in the trial; that these said employees admitted hostility to affiant in the trial of the case and other employees testified as to the attempts of these two employees to undermine affiant and gain control of his business.

That many facts have been developed since the trial of the case showing that this document is a forgery and that it was designed to bring about the conviction of affiant.

That in addition to the proof of evidence manufactured by forgery affiant has been able to secure documents since the trial of his case that prove his complete innocence, as to each and every count. That these documents could not be secured by him during the trial, which was conducted each day from 9:00 in the morning until 6:00 and 7:00 in the evening, as they were in a bombproof shelter about twelve miles from the place of trial, and required an application to the Navy and Army to get access to them, and it was necessary to give such notice in advance in addition thereto. That about a week

before affiant's trial heavy boxes were placed in this bombproof shelter which could not be removed and which blocked access to any of the files and reports during that entire period and during the period of the trial.

That each and all of these facts can be presented to the trial court upon a remand of the case and further consideration by the trial court.

Wherefore, affiant prays that this Honorable Court withdraw the case from consideration on appeal and remand the same to the trial court for further consideration on motion for a new trial, and that the case be held in abeyance until the trial court passes upon this newly discovered evidence showing that affiant's conviction and sentence was based upon a forged document.

EDWARD F. ZAP.

Subscribed and sworn to before me this 3rd day of July, 1943.

[Seal] LUCILE TOWLES SUTHERLAND,
Notary Public in and for Said County and State.

Received copy of the within Affidavit this 3rd day of July, 1943.

UNITED STATES GOVERNMENT.
By JAMES E. HARRINGTON,
Spec. Asst. to the Atty. Gen.

[Endorsed]: Filed July 6, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF LAWRENCE J. BUYS

State of California,
County of Los Angeles—ss.

Lawrence J. Buys, being first duly sworn, deposes and says:

That he is an Examiner of Questioned Documents of more than sixteen years experience, during which time all of his working time was devoted exclusively to Questioned Document Problem Work; that he maintains an office and a completely equipped laboratory for the purpose of scientifically examining document problems submitted; that he has been called in by City, County, and Federal law enforcement agencies to examine documents in dispute or in question and report his findings; that he has testified as an expert on questioned documents in Municipal Courts and Superior Courts of Los Angeles County and other Counties of California; that he has testified as an expert on documents in other States of the Union and in Federal Courts; that he has testified as an expert on questioned documents before the Los Angeles County Grand Jury and other Grand Juries of California; that he has been appointed Court's Expert to examine documents and report his findings directly to the Court.

That he was requested by Morris Lavine, attorney for Edward F. Zap, to make a careful microscopic examination of Government's Exhibit #19

consisting of three pages of original typewritten and ink signatures and two pages of photostats.

That, in particular, he was requested to carefully examine that part of Government's Exhibit #19 reading:

> "I, Edward F. Zap, do hereby certify that I have paid to William McAvoy the sum of Four Thousand and No/100 Dollars ($4,000.00), as payment for Flight Testing of OS2U-2 under terms of Contract Nos. 83142, this being paid by my check #2679, dated 9-23-42.
> (Signed in ink) EDWARD F. ZAP
> Edward F. Zap
> October 13, 1942."

That the problem submitted was to determine, if possible:

(1) Whether this document was typewritten completely, including the line for signature, and the ink written signature "Edward F. Zap" then affixed thereto; or

(2) Whether the ink written signature "Edward F. Zap" was first affixed to this document in blank, and the typewritten contents subsequently typed thereon.

That in connection with this examination and study he prepared numerous photographic studies, these photographs being made at varying degrees of magnification and with varying light conditions; that these photographic studies included stereoscopic photographs of varying degrees of magnification for the purpose of recording third-dimensional

views of pertinent areas; and that for the purpose of allowing at least a partial study, photographically, of the problem at hand. A limited number of these photographs are attached hereto and made a part hereof.

That he aproached this problem with great caution, recognizing the seriousness of the problem at hand and the responsibility imposed upon him in accepting the task; and that he microscopically examined the original documents comprising Government's Exhibit #19, examined photographs made of these originals (including color films), and conducted Sequence Tests of Typewriting and Handwriting written by Edward F. Zap over varying periods of time under his direction before allowing himself to voice any definite conclusions. That this careful study was begun June 22, 1943 and not completed nor was any definite verbal opinion expressed until June 28, 1943.

(An exact size photographic reproduction of the questioned typewriting and signature "Edward F. Zap" is affixed immediately below and made a part of this affidavit:)

(For the photograph, see original affidavit transmitted as an exhibit to The Supreme Court of the United States with this Transcript.)

That as a result of these carefully conducted examinations and studies, it is his definite conclusion that the signature in question "Edward F. Zap" was first affixed to this document in blank and that

subsequently the signature was used to accommodate the typewritten wording now a part of the document in question.

That a second document (exact size photograph of which is affixed to this page and made a part of this Affidavit) served as one excellent examplar or standard of comparison, as it was also a part of Government's Exhibit #19 and contains an ink written signature "E. F. Zap" which contacts the typewriting in several areas, each of which is readily recognizable as showing a proper sequence of typewriting first and handwritten ink signature second, when viewed under a microscope or when properly magnified photographically.

(For the photograph, see original affidavit transmitted as an exhibit to The Supreme Court of the United States with this Transcript.)

That this undisputed physical evidence of typewriting first and ink writing afterward is clearly recorded by the fact that wherever this ink signature contacts the typewriting, the writing ink is repelled by the oil in the typewriting ink, giving the writing the appearance of having been written in segments above and below the areas of typewriting contacted, with no ink deposited on the typewriting or immediately adjacent thereto.

That a careful microscopic examination by a stereoscopic type microscope reveals great physical changes of the paper surface when struck by the horizontal bar character that makes up a typewrit-

ten signature line, thus: "_____"
That this change consists of a relatively deep impression into the surface of the paper into which a coating of oily typewriting ink is impressed, a 'indentation' or 'trench' that holds the oil of the ink for a considerable length of time before it absorbs into the paper; that as it absorbs into the paper it spreads up and over the edges of the 'trench' on the paper surface. That under these physical conditions, a handwritten signature ink is repelled by the oil, skips the 'trench' or indentation, drags some of the carbon of the typewriting ink along the line or writing, smashes the lower edge of the 'trench' in a down stroke or the upper edge in an up stroke as the pressure tears into the far bank of the impression or indentation, or in some other physical manner reveals the fact that the typewritten line was affected by the ink written line being made over it.

That when an ink written signature is placed on a paper in blank and typewriting signature line is then typed over that signature, the typewritten 'trench' or indentation is not affected by the pressure of the pen. The signature ink being already dry on the paper surface, is impressed into the paper surface under the typewritten impressions, and can be seen to approach the upper edge and emerge at the lower edge (in a down stroke) of the typewritten 'trench' without any distortion of the edges of that ink written stroke. Further, that when viewed with a transmitted light (light underneath the paper with a microscope focused on top

of the paper) the differentiating ink writing color can be seen to continue it's unbroken margins down into the 'trench' and up over the far edge and onto the level of the surface.

That a second standard or exemplar consisted of a series of staggered handwritten letters "Z", written under direction of the expert by Edward F. Zap, wherein a series of six sheets of paper containing typewritten signature lines and recording the date and time of day of the typewriting were handed to Mr. Zap with the instructions to sign a series of "Z's" on No. 1 sheet immediately, and to stagger the remaining five sheets by writing at varying times over a period of 24 hours, recording the date and time of day of each writing; and a second series of six blank sheets of paper with instructions to again stagger the "Y's" over a 24 hour period, after collecting which the expert typed signature lines across the handwritten "Y's", recording on each the date and time of day.

That in each instance these twelve exemplars clearly stamp the sequence of the ink and typewriting by one or more of the telltail physical evidences outlined herein.

That page (7) of this affidavit contains magnified photographs of the areas the letter "Z" in question crosses the typewritten signature line; and that page (8) contains magnified photographs of the areas the letter "Z" in signature "F. E. Zap" (exemplar) (see page (4)) crosses the signature line.

(For the photographs, see original affidavit transmitted as an exhibit to The Supreme

Court of the United States with this Transcript.)

That he has prepared and affixed to this affidavit in envelopes immediately below sterescopic photographs of contact areas of ink signatures and typewritings on questioned signature "Edward F. Zap" and exemplar signature "E. F. Zap", showing the contact of the down stroke in each instance with the typewritten line. This stereoscopic photograph in each instance is at the same magnification as the magnified photographs on pages (7) and (8) of this affidavit. (Area identified on reverse side of each.)

(For the photographs, see original affidavit transmitted as an exhibit to The Supreme Court of the United States with this Transcript.)

That in addition to the photographs made a part of this affidavit, he has prepared a complete photographic illustration of the physical evidences outlined herein, including a step by step series of stereoscopic photographs of all pertinent areas, which together with the series of Sequence Tests made under his direction by Edward F. Zap constitute, in his opinion, clear and definite proof of the conclusion he was forced by the evidence to arrive at, namely, that the questioned signature was first affixed to the questioned document in blank and that at some subsequent time the present type-

writing was added to complete the document in it's present condition.

Further affiant saith not.

LAWRENCE J. BUYS

Subscribed and Sworn to before me this 30th day of June, 1943.

[Seal] VENA M. McKAVISH,
Notary Public in and for the State of California,
County of Los Angeles.
My Commission expires June 11, 1947.

[Endorsed]: Filed July 6, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S RESPONSE TO MOTION TO REMAND

We append hereto copies of the three counts (counts I, IV, and V) of the indictment on which Zap was found guilty by the jury, together with a copy of the jury's verdict. Other counts had been removed from the jury's consideration.

COUNT I.

Under the first count, the evidence showed in brief that Zap had presented false claims to the Navy, totaling $1500.00, falsely alleged by him to have been for power expense at the University of Washington Wind Tunnel and paid directly to the power company in Seattle, Washington, by Zap; all in addition to the true bill for this expense in the

approximate sum of $1950.00, under his contract NXs-4105, with the Navy.

Since no attack is made on any of the evidence adduced to sustain this count, and since no specific "newly discovered evidence" is mentioned which would in anywise tend to relieve Zap of culpability under this count, we submit to the Court only the copy of Count I of the Indictment and of the verdict of the jury, with reference to this phase. (See Appendix hereto.)

COUNT IV.

Count IV charges the making and causing to be made, and presenting and causing to be presented for payment a false claim to the Navy.

One McAvoy was hired by Zap as a test pilot, at an agreed fee of about $2500.00. Zap prevailed upon McAvoy to endorse a blank check, then later had the check filled in for $4000.00 and ran it through his bank. This was used as the basis of the false claim, when in fact, McAvoy had been paid in full by cash and two other checks on another bank, all totaling no more than $2575.00. (Appendix.)

The testimony of McAvoy is herewith presented to the Court in full (Appendix) together with photostats of the check for $4000.00. It is notable that the $4000.00 check is correctly described in the questioned instrument by number and amount, and that McAvoy endorsed the $4000.00 check in blank upon the personal request of Zap. Zap too, on cross-examination (Appendix) testified that his original agreement with McAvoy contemplated the payment to McAvoy of about $2500.00 all told.

The questioned instrument is only one of a number of documents which all went together to make the false claim, all of which were signed by Zap, and the questioned document is a supporting document only. (Appendix.)

It is urged by the Government that the appellant's motion is insufficient in this respect in showing newly discovered evidence.

The only discovery set forth is that Zap's signature may have been attached to one questioned document in Government Exhibit 19, before it was typed.

No other "newly discovered" evidence is delineated to the court—only the vague statement that the defendant "has been able to secure documents since the trial of his case that prove his complete innocence as to each and every count." (Affidavit of Edward F. Zap, in this motion, page 5, lines 9-10.)

The "discovery" set forth raises nothing more than the suspicion of Zap, which was before the jury just as definitely as here. The affidavit of Zap and the affidavit of Buys create no new situation. No new facts are presented to the Court by which the Court can conclude anything except that the typed line beneath the signature was affixed after the signature—or, projecting this to an inference concerning the entire document, that all the typing was placed on the paper after the signature.

No showing is made that this was not done under Zap's authority; in fact, the showing is quite the reverse. The other documents of Exhibit 19, all signed by Zap, taken together are obviously de-

signed to fraudulently secure $4000.00 odd from the Navy as reimbursement for the test pilot's fee, when in fact, the test pilot had been paid only $2575.00 in all. Without the questioned exhibit, the false claim against the Navy was complete, and when coupled with McAvoy's testimony and that of Zap, it is ample to sustain the jury's verdict. The same suspicion was raised by Zap before the jury.

COUNT V.

The fifth count pertains to the same basic transaction, as it charges covering up by trick and device a material matter within the jurisdiction of the Navy.

An excerpt from the testimony of Thomas Cedric Browne, a Certified Public Accountant, who designed and supervised Zap's books is appended hereto showing that the falsely claimed $4000.00 was entered in Zap's books in the regular course of business.

A certified copy of a contract between the Navy and Zap was admitted in evidence—Naval Contract No. NOs 83142—which provided, among other things, in substance, that Zap's books and records should at all times be open to inspection and audit by the Navy—thus satisfying the statute that the matters were within the jurisdiction of the Navy—a department of the United States.

The appended excerpts from the testimony and photostatic copies of exhibits are submitted not as all of the evidence supporting the verdicts on counts IV and V, but as cross-sections, in order to enable the Court to understand the nature and tenor of the

evidence against Zap. It is necessarily incomplete, and the Government presents its apologies for omissions, all of which have been occasioned by the shortness of time available for the preparation of this Response.

APPELLANT'S DILIGENCE IS LACKING

The indictment was returned November 25, 1942. The trial commenced April 6, 1943.

Appellant Zap makes no showing, either in this Court or the Court below, that he made any application to the lower Court, during the interim, for permission to inspect any of his documents in the possession of the Navy prior to March 30th, 1943. This showing was made in the lower Court by affidavit of Zap, in support of a motion for continuance of the trial, which was denied by the trial Court.

It is submitted that the motion to remand be denied.

JAMES E. HARRINGTON,
Special Assistant to the
Attorney General
GEORGE R. MAURY,
Special Attorney
TOM C. CLARK,
Assistant Attorney General

(Clerk's Note: The appendix to this response consisted of Counts I, IV and V of the indictment; the verdict of the jury; the judgment and commitment; excerpts from testimony of various witnesses;

and photostatic copies of Government's Exhibits 19 and 7; Exhibit 19 containing the questioned documents. The original exhibits in the case are being transmitted to The Supreme Court of the United States; all other items in this appendix are printed as a part of the transcript of record.)

[Endorsed]: Filed July 6, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF EDWARD F. ZAP

State of California;
County of San Francisco—ss.

Edward F. Zap, being first duly sworn deposes and says:

That he is the appellant and petitioner herein.

That at the time of the trial of his case, and particularly at the time of the motion for a new trial, the evidence which the Government claimed was a violation of Count I was the alleged engineering by affiant of a cargo plane; that it was claimed that affiant charged the Government with wind tunnel fees for said cargo plane when said plane was not a part of the work contracted for by the United States Navy; that the Government labeled this work as Project 15, and claimed that Project 15 was not part of the work done under contract.

That affiant was unable at the time of trial to secure certain records, documents and papers which would demonstrate conclusively to the jury that this work was done pursuant to Navy contracts; that

all of affiant's books, records and papers were taken by the Navy to a bombproof shelter in the Douglas Aircraft Corporation plant; that affiant went to the Douglas plant a few days before the trial, expecting to have said files and records readily available to him, but that instead, they were surrounded by boxes containing ammunition and other materials, and that they weighed 310 pounds each; that affiant was informed that it would be impossible to move the boxes or for him to have access to his records and files for a period of at least ten days; that when the trial commenced affiant moved for a continuance because of the unavailability of his files and records to him, which continuance was denied.

That the trial lasted each day from nine and nine-thirty to six and six-thirty in the evening; that affiant was therefore unable to get certain papers and records which establish that the so-called Project 15 was a project authorized by contracts with the United States Navy and related to a flight wing for the Grumman Navy fighting plane, which design would, when constructed, accommodate two cannons in the wing besides six machine guns and which was a new type of wing being offered to the United States Navy; that special secrecy was attached to it.

That since the trial of the case affiant has had these documents, records and papers available to him and has submitted reports from them to the United States Navy and has received approval by the Navy of his wind tunnel reports and verification as to each of these tests being under the specific

terms of his contract with the Navy; that such reports and such approval were not available to him at the trial but have since become available to him and constitute new evidence material to his case, which could not with reasonable diligence have been secured and presented at the time of the trial.

That the following documents are now available which were not available at the time of trial, and which could not with reasonable diligence have been secured at the time of trial, and which would have established the correctness and accuracy of each charge made to the Government:

1. Letter from the University of Washington, Department of Aeronautical Engineering, Seattle, dated Feb. 18, 1942;

2. Accounting forms (C-4) and (C-5), and invoices on Contract No. 4105, complete and billed to the United States Navy, and public vouchers made up from these invoices, will be brought to the court at request, since they are too bulky to be copied and appended. These are listed below as follows:

Invoice numbers 71, 70, 67, 66, 65, 64, 60, 55, 54, 52, 44, 43, 32, 30, and 12 invoices dated June 29, 1942, which cover the complete billing on Contract 4105, from the beginning of the contract until invoice 71, dated Nov. 23, 1942.

In addition to these invoices, the (C-4) and (C-1) forms which were ever issued on Contract 4105, as follows:

(Z) 2, 6, 8, 12, 15, 17, 28, 29, 30, 31, 32, 35, 37, 39, 42, 47, 49, 50, 57, 61, 63, and (X) 1 through 22 inclusive.

3. Wind Tunnel Reports 154-A, 154-B, 173, 177, 178, 183, 188, 189 and 190, which cover all the work done at the University of Washington Wind Tunnel from Dec. 1, 1941 until July 28, 1942, as outlined in the UWAL letter of Feb. 18, 1943. This covers five distinct testing periods at various times as follows:

Period A. December 1 through 5, 1941.

Period B. February 24 through 28, 1942.

Period C. March 2 through 16, 1942.

Period D. May 12 through 16, 1942.

Period E. July 20 through 24, 1942.

COUNTS IV and V.

Affiant states that with reference to these counts the evidence shows without conflict that affiant signed checks and papers in blank for the convenience of his office staff, especially when he was out of the city; that he received a blank check before he went to Dagget Field for a flight test and after carrying said check around for several days in his pocket, signed it in blank, and the flight test pilot also signed it in blank, and affiant turned it over to his bookkeeper; that thereafter affiant was not even in the city.

That affiant's bookkeeper took orders from one Harry Champlin and Cedric Brown, a certified public accountant; that the evidence shows that Harry Champlin tried to get control of affiant's business and thought he could accomplish this by getting affiant arrested.

That affiant is informed and believes, and therefore alleges that the bookkeeper inquired of either Harry Champlin or Cedric Brown how she should fill in the blank check, and that she filled it in pursuant to instructions she received from them and not from affiant; that she so testified in the trial, and that her testimony and the testimony of others in connection with this transaction is appended hereto as a part of this additional affidavit and made a part of these proceedings. The testimony of the certified public accountant, Cedric Brown, and the testimony of said Harry Champlin is also attached hereto and made a part of these proceedings.

That the basis in the evidence for the allegations of the Government that affiant personally claimed $4,000 was the forged document typed over affiant's signature, and which was sent to the Navy contrary to the usual form and custom of filing these claims. That this forged document was at the time of its presentation to the court and jury the only correspondence of affiant which appeared to be an alleged claim for $4,000.

Further affiant sayeth not.

EDWARD F. ZAP

Subscribed and sworn to before me this 26th day of July, 1943.

[Seal] (Signed) PAUL P. O'BRIEN,
Clerk, United States Circuit Court of Appeals for the Ninth Circuit.

Morris Lavine, being first duly sworn, deposes and says:

That prior to trial he asked Special Assistant Attorney George W. Maury, representing the government, to see the documents and papers which the government had in its possession regarding Edward F. Zap; that Mr. Maury took affiant and his client, Edward F. Zap and opened a drawer of a filing cabinet and stated "Here are all the documents you are entitled to see" and that these documents consisted of such books, records and papers which the government's agents had taken from the defendant's place of business or residence; that affiant did not at that time or until the trial see government's exhibit 19 which contains the forged document in question. That in fact affiant was told upon his visit that the government counsel were having trouble getting the documents and records from Washington; that the record shows Exhibit 19 to be a government exhibit from Washington.

MORRIS LAVINE

Subscribed and sworn to before me this 26th day of July, 1943.

[Seal] (Signed) PAUL P. O'BRIEN,
Clerk United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed July 26, 1943. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, July 26, 1943.

Before: Denman, Mathews and Stephens,
Circuit Judges.

[Title of Cause.]

ORDER DENYING MOTION FOR ORDER TO REMAND CAUSE TO DISTRICT COURT FOR FURTHER PROCEEDINGS, ETC.

Ordered motion of appellant for order to remand cause to District Court for further proceedings, and for taking of further evidence on a motion for new trial, etc., presented by Mr. Morris Lavine, counsel for appellant, in support of said motion, and by Mr. George Maury, Special Assistant to the Attorney General, counsel for appellee, in opposition thereto, and submitted to the Court for consideration and decision.

Upon consideration thereof, Further Ordered said motion to remand be, and hereby is denied.

Upon application of Mr. Lavine, Further Ordered time within which appellant may lodge his proposed bill of exceptions and file his assignments of error be, and hereby is extended to and including September 1, 1943.

July 27, 1943

To the Clerk of the Ninth Circuit Court of Appeals:

Please enter an exception to the order of the Ninth Circuit Court of Appeals denying my motion to remand the case of Edward F. Zap vs. U. S. to the District Court of the United States, Southern District, Central Division, for hearing on motion for new trial based upon discovery of forgery in document relied on by government for conviction.

MORRIS LAVINE
Attorney for Edward F. Zap

[Endorsed]: Filed July 27, 1943. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, March 15, 1945.

Before: Mathews, Stephens and Healy,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Morris Lavine, counsel for appellant, and by Messrs. James E. Harrington, Special Assistant to the Attorney General, and Alden F. Houck, Special At-

torney, Department of Justice, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Monday, June 4, 1945.

Before: Mathews, Stephens and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT

By direction of the Court, Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[Title of Circuit Court of Appeals and Cause.]

Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before: Mathews, Stephens and Healy, Circuit Judges.

Mathews, Circuit Judge.

OPINION

Appellant and Lloyd Scott were indicted in 13 counts. Counts 1-12 charged violations of § 35(A) of the Criminal Code, 18 U.S.C.A. § 80. Count 13 charged a violation of § 37 of the Criminal Code, 18 U.S.C.A. § 88. Appellant and Scott pleaded not guilty and were tried. In the course of the trial, counts 2, 6, 9, 12 and 13 were dismissed. Scott was acquitted on all remaining counts. Appellant was acquitted on counts 3, 7, 8, 10 and 11, was convicted and sentenced on counts 1, 4 and 5, and has appealed.

As to count 1, appellee confesses error and consents to a reversal of the judgment.[1]

Appellant filed with the clerk of the trial court

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[1]Appellee's brief states that "there is a real question as to whether the charge in [count 1] was sufficiently definite and certain as to apprise [appellant] with sufficient particularity of the crime with which he stood charged," and that, "For this reason * * * the Government [appellee] will not resist the appeal on count 1."

an assignment of errors[2] whereby—in numbered paragraphs called assignments—52 alleged errors were assigned. Appellants' counsel has filed with the clerk of this court 20 copies of a printed brief,[3] but the brief does not contain a specification of errors.[4] Errors assigned, but not specified, may be

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[2] By Rules 8 and 9 of the Rules of Criminal Procedure after Plea of Guilty, Verdict or Finding of Guilty, 18 U.S.C.A. following § 688, the appellant in a criminal case is required to "file with the clerk of the trial court an assignment of the errors of which he complains." Rule 2(a) of our rules governing criminal appeals provides: "The appellant shall file with the clerk of the trial court an assignment of errors, numbering each, and shall set out separately and particularly each error asserted and intended to be urged."

[3] Rule 20 of our general rules provides:

"1. Counsel for the appellant shall file with the clerk of this court 20 copies of a printed brief * * *

"2. This brief shall contain * * * *.

"(e) In admiralty and criminal cases, a specification by number of such of the assigned errors as are to be relied upon, with reference to the pages of the record where the assignments appear. Thereafter each such assignment shall be printed in full preceding the argument addressed to it. Where the specified error is more than two printed pages in length, it may be summarized before the argument addressed to it, in which event the specified assignment must be printed in full in an appendix. * * * "

[4] See paragraph (e), supra.

deemed waived.[5] Therefore we might well disregard the 52 assignments of error in this case.[6] However, we have not disregarded them, but have considered them, and, so far as they relate to counts 4 and 5, find not merit in them.

Judgment reversed as to count 1 and affirmed as to counts 4 and 5.

[Endorsed]: Opinion. Filed June 4, 1945. Paul P. O.'Brien, Clerk.

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[5] Love v. United States, 9 Cir., 74 F. 2d 988; Lonergan v. United States, 9 Cir., 88 F. 2d 591; Muyres v. United States, 9 Cir., 89 F. 2d 783; Waggoner v. United States, 9 Cir., 113 F. 2d 867; Roubay v. United States, 9 Cir., 115 F. 2d 49; Utley v. United States, 9 Cir., 115 F. 2d 117; Lane v. United States, 9 Cir., 142 F. 2d 249; Roedel v. United States, 9 Cir., 145 F. 2d 819.

[6] See cases cited in footnote 5.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10419

EDWARD F. ZAP,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed as to count 1 of the indictment and affirmed as to counts 4 and 5 of the indictment.

[Endorsed]: Filed and entered June 4, 1945. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Thursday, September 13, 1945.

Before: Mathews, Stephens and Healy,
Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR REHEARING

Upon consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant, filed July 5, 1945, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing eight hundred and nine (809) pages, numbered from and including 1 to and including 809, to be a full, true and correct copy of the entire record, excluding certain original exhibits transmitted herewith, of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 1st day of October, 1945.

[Seal] PAUL P. O'BRIEN,
Clerk

SUPREME COURT OF THE UNITED STATES

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

ORDER ALLOWING CERTIORARI—Filed January 7, 1946.

A petition for rehearing having been submitted in this case;

Upon consideration thereof, it is ordered by this Court that the petition for rehearing be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari entered December 10, 1945, be, and the same is hereby vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted, limited to the question whether books and records relating to the petitioner's contract with the Navy Department were properly admitted as evidence at his trial. The case is assigned for argument immediately after No. 404.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 482

EDWARD F. ZAP,

Petitioner

vs.

THE UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

MORRIS LAVINE,
620 Barlow Building, Los Angeles 14
Attorney for Petitioner

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

NO. .....

EDWARD F. ZAP,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Edward F. Zap, hereby petitions this Honorable Court for a writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause from judgments of conviction of Counts 4 and 5 of an indictment which were affirmed without opinion upon the merits of the questions raised by the petitioner in a case in which the United States of America was plaintiff in the District Court of the United States for the Southern District of California, Central Division, and the petitioner was the defendant.

The case was tried before a jury which returned verdicts of guilty as to Counts I, IV and V. The Government conceded that the conviction on Count I was er-

roneous and the Circuit Court of Appeals reversed Count I but affirmed Counts IV and V. The opinion of the Circuit Court of Appeals fails to set forth any grounds upon the merits upon which the judgments as to Counts IV and V were affirmed.

Jurisdiction.

The jurisdiction of this court is invoked under Section 240a of the Judicial Code (Title 28 U. S. C., Section 347, as amended) and the rules of criminal practice of this court.

From a trial in the U. S. District Court the defendant duly and regularly appealed. The Ninth Circuit Court of Appeals affirmed the judgments as to Counts IV and V on June 4, 1945. Petition for rehearing within the time fixed by law was duly and regularly filed. This petition was denied September 13, 1945. Upon application of the petitioner the mandate was stayed to and including the determination of this court.

Decisions of the Court Below.

The only opinion written by a Circuit Court of Appeals was the opinion of June 4, 1945, which appears on page 805 of the record.

Statutes Involved.

Title 18, Section 80 (presenting false claims). The Fourth and Fifth Amendments to the U. S. Constitution; Title 18, Section 611-616 regarding search warrants; U. S. Code, Title 50, Sec. 643 (First War Powers Act), and the President's Executive Order 9127; Title 28 Section 411 U. S. Codes regarding selection of jurors according to state practice; Code of Civil Procedure of California Section 204.

SHORT STATEMENT AND SUMMARY OF FACTS.

A. Facts of Case.

Petitioner Edward F. Zap is one of the foremost experimental aviation engineers in the world. Inventor of the Zap or split flap* [R. 557], the folding hinge winged device and other patents he has been advisor to the U. S. Navy on experimental work since 1927 [R. 561]. Working day and night, taking flight tests and doing experimental engineering, the actual work on his plans and designs was subcontracted and carried out by other firms. Because of difficulties and delays with subcontractors in getting the work out as desired by Zap and the navy, he secured his own plant in 1942, consisting of between 55 and 100 men. As he made flight tests along with flight pilots, worked in offices on field locations, made trips to Washington he frequently signed papers and checks in blank and left them for his office help to fill out [R. 468].

To make out his accounts, keep his financial records, and carry out the desires of the navy Zap consulted the Security First National Bank of Los Angeles and upon their recommendation hired Certified Public Accountant Cedrick Browne [R. 417]. He also hired a comptroller, Harry Champlin, whose job it was to keep track of books and records and payrolls with Browne. [R. 416]. Ethel Boyle, a bookkeeper, actually kept the books. Zap never looked at them or saw them [R. 476].

The navy maintained several inspectors at Zap's plant. They audited accounts and they made out the claims to

*The flap enables shorter takeoff and shorter landings.

be filed. On cost plus items, Zap would notify the cost inspector and request that the charges be audited and approved and the necessary vouchers prepared [R. 291]. After the navy had reviewed the item, the voucher would then be prepared forwarded to Mr. Zap for his signature, then, after being signed by the cost inspector, would be forwarded to the disbursing officer in San Diego [R. 291].

There was always a certain amount of retention of funds, and in event of mistake or are incorrect the items would be reaudited and the items corrected [R. 393]. Zap was arrested on the particular item in Counts IV and V before such reaudit or correction.

A new Zap experimental airplane having been completed and requiring flight testing and re-engineering, Zap hired William Henry McAvoy, a flight test pilot of renown, to make the tests [R. 304]. The letter of Zap to the Navy, requesting authority, contained the quotation "A. Chief test *pilot's fee and insurance*" $4000 [R. 305] (Govt. Exh. 3.)

The fees for the flight test include all the incidentals that go with it — the cost of the pilot to and from his home by airplane [R. 305]. Zap took care of these [R. 305]. Expenses on the trip. Living expenses while on location. Insurance of every kind on the pilot, the plane, and workmen [R. 306-7] Zap accompanied the pilot, made sixteen flight tests, engineered the data, working day and night [R. 308].

On September 23, 1942, before Zap left for his flight test, his bookkeeper, Ethel Boyle, gave Zap a personal check on his bank account, which she had dated but which was not filled out.

On September 23, 1942, Zap and his crew went to Daggett Field, California, a distance of about 100 miles from Los Angeles, to flight test the new Zap airplane. Zap paid all expenses. He obligated himself to all insurance, the insurance items amounting to two or three or four thousand dollars [R. 487].

Zap paid McAvoy $2,075 by check at the field. He gave McAvoy $300 in cash at the field. He gave McAvoy an additional check for $200 at the field and $50 petty cash. He also paid flight insurance as agreed upon and obligated himself for considerably in excess of $4000.

After the flight test Zap returned to Los Angeles where the navy cost inspector made out a claim and voucher, according to its procedure, for $4300. It was sent to Zap for signature, and signed and notarized; it was countersigned by Commander G. A. Smith and by Ensign Minor. The claim does not itemize what the $4300 was for. Although the Government charges a claim for $4000 was false, it was this claim for $4300 which the Government presented in evidence against petitioner as to Count IV.

Also, it was not denied by the government that although the indictment charged that McAvoy had received $2375 and no more that McAvoy had received $2625 and that Zap had paid all expenses of travel and flight test insurance and that he had paid or had obligated himself in excess of $4000.

When Zap left on the trip on September 23, 1942, Ethel Boyle, bookeeper, gave Zap a personal check in blank on which she had typed the date. On the flight test Zap asked McAvoy to endorse the check, saying, according to McAvoy it was going to be used for drawing some money to cover general expenses [R. 301]. Mc

Avoy endorsed it. When Zap returned on October 13, he had also endorsed it, but the check was entirely blank. Ethel Boyle asked Certified Public Accountant how to fill it in and whose name to fill in. Browne told Miss Boyle to fill it in for $4000 which she did also to type in the name of McAvoy. Zap knew nothing about this [R. 406-7]. She affixed a rubber stamp endorsement on it and immediately deposited it in Zap's personal account [R. 407]. It appears later put away in Zap's private file from which it was taken without Zap's knowledge or consent or any second warrant at the request of F.B.I. Agent Myerson. The check was Government's Exhibit 7.

On October 18, 1942, Zap left for Washington, D. C., to flight test his airplane at the navy testing grounds at Anacostia.

One Harry Champlin was working for Zap as comptroller Champlin conceived the idea that if he could get Zap arrested and imprisoned that the navy would put him in charge of Zap's plant. Stuart Eldridge Waver, Jr., was placed in charge of Zap's business while Zap was in Washington.

Facts as to Procedure. The Search and Seizure.

On October 20, 1942, FBI agents, called in through Champlin, began searching Zap's books and records *without* any search warrant or other security [R. 135, *et seq.*] On occasions they clashed with navy inspectors who said they had no right to look at the confidential books of navy contractors. On October 31, 1942, the FBI agents Myerson and Earl secured a search warrant on the basis of an affidavit of Harry Champlin. The Government in the Circuit Court of Appeals conceded that this affidavit was insufficient to show probable cause.

On November 5, 1942, FBI Agent Myerson, without a search warrant, went to Ethel Boyle, Zap's bookkeeper, and asked her to get the check which Zap had endorsed in blank and McAvoy had endorsed in blank and which she later filled in [Gov. Exh. No. 7] and turn it over to him. She got it out of the file and he seized it and kept it for the government's evidence.

On November 6, Zap protested against the FBI agents examining his confidential books and records and seizing them. He said Champlin was trying to smear him and had been fired. The agents told him to go home and take a scotch and soda [R. 149]. They continued their search.

December 1, 1942, the agents secured another search warrant based upon Harry Champlin's faulty affidavit and their previous search under it. Under this search warrant they seized books and records which were later introduced in evidence. There was never a search warrant for Gov. Exh. 7.

Zap and Scott Jointly Charged.

Zap and Lieutenant Commander Lloyd V. Scott were jointly indicted and charged with presenting false claims. As the trial court directed the verdict as to all counts relating to Scott at the close of the government's case the question arises as to whether the acquittal of one did not acquit the other as a matter of law.

Zap's Defense Material Sequestered.

Immediately after Zap's arrest all of his files and office papers were boxed up in thirteen large boxes and taken to the government's bombproof shelters at Douglas Aircraft Company and held under guard. Although the

navy said it would release them to Zap upon any order of court, the district judge before whom the matter originally came on for hearing declined to make any order for want of jurisdiction [R. 32]. Government counsel opposed the defendant's *request to get his own files* to make his defense.

Zap's Motion for Continuance Denied.

At the opening of the trial, a motion for a continuance to give defense counsel ten days time to prepare because his files at the Douglas Aircraft had been surrounded by 300 pound boxes of ammunition which could not be moved was denied [R. 214, 243] and exception noted.

Timely Motion Made to Suppress Evidence. [R. 127, 134, et seq.]

In advance of trial, timely motions were made by Zap to suppress and return the evidence illegally searched and seized. The prosecution countered that it had only searched pursuant to the search warrant. It claimed seizure only under the search warrant. This warrant it later admitted was based upon a faulty affidavit.

The defendant gave notice [R. 134-135] and requested permission to take oral testimony on the motion to suppress, as he wished to call the FBI agents in support of his motion. The court denied permission to take oral evidence [R. 237, 238]. Again reviewed in the trial [R. 368, 369, 380] an offer of proof that an examination of Myerson would show he acted illegally and without authority and without a search warrant or other legal authority was rejected [R. 166, 167].

Champlin Plans to Take Over Zap's Business.

While Mr. Zap was in Washington Champlin told various employees in the office that Zap was going to be arrested [R. 499] and he admitted that he made out the affidavit for the search warrant for the FBI [R. 500]. He never at any time telephoned Zap or informed him of the investigation, but he did O.K. a telephone call by Mr. Hanley to Washington to see what could be done about taking over the business of Zap. This call was made on October 27, 1942, four days before Champlin made the affidavit for the warrant [R. 501].

Zap Complains of Search Without Warrant.

Zap complained to the FBI agents about their searching his premises or his books and records [R. 148]. He observed Myerson and Sloane daily making an inspection and examination of books, records and documents throughout the entire month of November, until November 25th, but they had no search warrant of any kind or any process or pretended process.

On or about November 6, 1942, Zap called a meeting of his several employees, and in the presence of Myerson and Sloane objected to their entering his safe and using Champlin, saying, "It is not right for you to go in there and use Champlin, as he is the crook and is trying to smear me. He has already been fired and has no right to be in the office, and no one has any right to look at these papers as they are the confidential papers of Edward F. Zap Aeronautical Engineers and concern their contracts with the navy." That the said Myerson and Sloane did not at that time have any search warrant for

the examination of the books, papers, records, ledgers, ledger sheets, cost sheets, payroll accounts, journals and documents [R. 149].

When Zap protested that no one had any right to enter the safe and look at these confidential records and documents Myerson said he was going to examine them for himself and find out what facts he could, and stated to Zap, "You had better go on home and have a scotch and soda and forget your troubles here." [R. 149.]

Ethel Boyle also made an affidavit that all of these books, records and documents were in a safe or in the personal desk of Mr. Zap and could not be observed, but that from time to time these FBI agents asked her to open the safe each morning, and whenever they wanted to get something out of it, and that as a result they continued their inspection during the month of November [R. 153-156]. This is corroborated by the affidavit of Estelle Zap [R. 157-160].

Insufficient Affidavit Used to Secure Search Warrant.

On December 1, 1942, Myerson made an affidavit for a search warrant pursuant to which search warrant he seized, according to his return, the exhibits which were later admitted in evidence as exhibits 32 to 45 in evidence. This affidavit did not set forth the commission of any crime or any probable cause, but merely said "This affidavit is made for the purpose of securing a warrant for the search of the premises known and described as follows: The two ground floor rooms of the premises occupied by E. F. Zap Aeronautical Engineers and located at 1005 Broxton Avenue, Westwood Village, Los Angeles, California. "That affiant was on the above premises by reason of a previous search warrant and observed

the hereinafter described books and documents. That, by reason of the above facts affiant says that at the above described premises, there is now unlawfully possessed and kept the following described property, articles and things: . . . ." (Listing certain things which became exhibits 34 to 45 in evidence.) [R. 178.]

No other fact was set forth in the affidavit of Myerson. No allegation of fact is contained in the affidavit as to any violation of any law.

Pursuant to this search warrant a return was made of these documents [R. 176, 177] which were later admitted in evidence against appellant.

All of the employees of Zap stayed on for several weeks after his arrest, hoping that the matter would be cleared up.

All Other Zap Papers Looked Up.

Immediately after December 1st, however, the navy took into its possession and protective custody all of Zap's papers, documents, records, general correspondence and files, and removed them to a bomb and fire-proof vault at the Douglas Aircraft Corporation [R. 124, letter of Commander Smith dated December 7, 1942]. Commander Smith stated in his letter that "upon order of the court, any part of the material described above will be released to the court. *Please give at least two days' advance notice in order that we may open up the boxes and get the files or drawings desired.* They will then be surrendered to the court." [R. 125.] These boxes contained everything that Zap had, including his contracts, invoices, vouchers, files, etc. (Italics ours.)

Zap made a motion and request of the court to have these things returned to him, but Judge Leon Yankwich denied the motion on January 12, 1943, holding that he had no jurisdiction in the matter; exception noted [R. 32]. This left Zap without any of his records, or his own files to prepare his defense.

Demurrers and Motion for Bill of Particulars Overruled and Denied Excepted to.

Demurrers [R. 102] and motion for a bill of particulars [R. 110] were duly filed; also motions to suppress and return the evidence illegally seized in violation of the Fourth and Fifth Amendments to the United States Constitution [R. 128]; also a motion to inspect the minutes of the grand jury and the plea in abatement, on the ground that the indictment was based upon illegally secured evidence [R. 134].

The court overruled the demurrers on all of the grounds therein specified; which grounds were the vagueness and uncertainty of the indictment and its failure to state an offense against the laws of the United States, duplicity of the counts, failure to apprise the accused of the nature and cause of the accusation, failure to set up facts regarding any of the allegations in the indictment [R. 102, *et seq.*]

Bill Demanded Terms of Contract; Also Claim.

The demand for a bill of particulars requested the provisions and terms of contracts NXs 4105 and 83142, as well as the terms of any and all supplements and amendments thereto; the exact and specific terms of the claim allegedly presented by Mr. Zap. The same request was made as to Counts IV and V, with the additional request

for the same of the disbursing officer to whim the alleged claim was presented and the exact items that were allegedly paid to William H. McAvoy and what expenses he was paid for, and what portion or portions of the claim it was alleged were false and under Count V, to set forth the exact material fact that was alleged to have been concealed and the alleged false and fraudulent statement and representation and wherein it was claimed to have been false and fraudulent; the exact duties of Hilton Byars; and the exact items for which McAvoy was allegedly paid approximately $2,375.00.

This demand for a bill of particulars was denied and exception allowed.

A notice to produce books, papers and records of Zap, including all contracts involved, and all correspondence, etc., was served on the United States Attorney [R. 208-210] on April 3, 1943 [three days before trial, R. 210].

A plea in abatement was also filed by defendant Zap on the ground that the grand jury which indicted him was illegally constituted in that it was composed entirely of men and that no women were on the panel, and that their selection was in violation of Title 28, Section 411, U. S. C. [R. 210-212]. This plea was also overruled by the trial judge and excepted to [R. 243, 244, 255].

At the outset of the trial on April 6, 1943 [R. 243] defendant Zap objected to proceeding to trial on the ground that all of his papers and documents which he needed for his defense were locked up in a bomb-proof shelter and that the Government had resisted defendant's effort to get them; that he had no adequate opportunity to prepare his defense in view of the fact that he could not get to the boxes and that army and navy representa-

tives were present in the room where they were at all times [R. 244, 246].

The affidavit of Zap in support of this motion showed that the boxes were surrounded by several very large boxes each weighing 360 pounds and it was impossible to move them [R. 215]. It was the Government's position that for the defendant to get possession of his own papers he had to specify just what papers he wanted [R. 250].

Appellant requested a ten-day continuance so that he could prepare his defense [R. 252]. The Goverment resisted the giving of these papers and files to Zap, and further resisted the bill of particulars [R. 254, 255].

The court denied the motion for a continuance, and exception was noted [R. 255].

Zap also objected that his rights under the Fourth and Fifth Amendments to the Constitution of the United States were violated [R. 257].

The court then proceeded with the calling of the jury. The jurors were duly impaneled and sworn to try the case, and the trial began.

Juror Excused After Impanelment Without Zap's Consent.

After the selection of the jury, on the second day of the trial, Government and defense counsel held a discussion at the bench, without the hearing of the jury and defendants Zap and Scott [R. 261]. At that time Government counsel asked that juror No. 2 be excused because he was observed to go over and shake hands with defendant Scott and enter into a conversation with him [R. 261]. FBI Agent Myerson had observed this according to Government counsel, as did also Mr. Sloane.

The Government, which had resisted calling Murray Myerson as a witness in the matter of suppressing the evidence, took testimony from Myerson regarding his observation of this juror [R. 263]. After the testimony and the demand by the Government to excuse juror No. 2, a Mr. Wiget,—which was at first resisted by counsel for defendant Zap, counsel for defendant Scott agreed to the excusing of said juror and this stipulation was joined in by counsel for defendant Zap. Counsel then returned to their seats at the counsel table and the court excused Juror Wiget [R. 272].

Defendant Zap was neither consulted, nor did he hear the proceedings, nor was his consent obtained prior to the excusing of this juror. His counsel, however, had expressly consented at the bench.

On the morning of the second day of the trial the Government gave to the defense, for the first time, the documents and records belonging to Zap which had been held by Commander Smith of the navy [R. 273].

The indictment charged 13 counts. The Government proceeded on the theory of a conspiracy and joint operation of defendants Zap and Scott. At the close of the Government's case, however, the court granted the motion of defendant (Lieutenant Commander) Scott for a directed verdict on the ground of insufficiency of the evidence, and directed a verdict in his favor on all counts. He denied Zap's motions and allowed exceptions.

During the course of the trial defendant Zap again renewed his motions to suppress the evidence and strike from the evidence the exhibits which had been seized without any search warrant or other legal process or pretended process, on the ground that they were violative of

the Fourth and Fifth Amendments. These motions were denied [R. 368]. The court even declined to reconsider the motions because they had been passed upon by a previous judge, to-wit, Judge Yankwich [R. 369], and took the position that he would not go over the matters that Judge Yankwich had passed upon. This was assigned as error and exception taken [R. 369, 380].

The defendant Zap also asked leave to call Murray Myerson as a witness regarding his illegal search and seizure of the evidence, which motion was denied, the court refusing to permit the taking of oral testimony from Myerson [R. 380].

The motions to strike Exhibit 7 on the ground of illegal search and seizure under the Fourth and Fifth Amendments were also denied [R. 379, 380].

An offer of proof as to what Myerson would testify to was rejected and exception noted [R. 378-380].

At the close of the Government's case defendant Zap made motions for a directed verdict, and again renewed his motions at the close of his own case, which motions were denied and exceptions noted.

Wilfulness Defined as Careless Disregard. No Instructions Given Jury on Statute.

The trial court read the indictment to the jury, but never the statute or the statutory definitions of the crimes charged.

The trial court instructed the jury that "wilfulness means . . . conduct marked by careless disregard as to whether or not the thing done is lawful." [R. 689.] This instruction was objected to as incorrect standard under the statute of this case.

The court also singled out this appellant in the course of his instructions, over objections, by stating that the jury had a right to take into consideration the interests that the defendant Zap might have in the case, his hopes and fears, and what he had to gain or lose as a result of the verdict. [R. 686.]

During the course of the instructions to the jury the trial judge told the jury that it could disregard the reference in the indictment to the defendant Scott, who was jointly charged with defendant Zap in the plural; the indictment referring throughout to the defendants Lloyd V. Scott *and* Edward F. Zap having allegedly committed the acts charged. The jury after retiring had great difficulty with the indictment and asked to have it reread, and also asked for the instructions to be sent to the jury room.

Motions for a new trial and in arrest of judgment were made and denied, and exceptions noted [R. 731, *et seq.*]

"Motion to Remand After Trial on Discovery of Forgery."

On the last day of taking evidence in the trial, a document was first shown to Zap, page 5 of Exhibit 49, which the government used in evidence to convict him of Counts IV and V. Properly the document appeared to be a "certificate" within the meaning of Count VI of the indictment, which was dismissed. Actually it was submitted to the jury in support of Counts IV and V. It was undated, unnotarized and there was no navy stamp on it or

anything to indicate or show when it got to the navy or how or why.

Zap testified the document looked strange to him. It was on stress paper, the kind he usually made out his technical stress reports on and had sent to the navy.

Immediately after the trial it was submitted to Lawrence Buys, formerly with the FBI and an examiner of questioned documents. He pronounced the document a forgery, declaring that the typing on it had been done over Zap's signature, which was on the paper first.

A motion was made in the Ninth Circuit Court under Rule III, Sub. 2 to remand the case to the trial court for consideration of a motion for a new trial because the document was forged and counterfeited.

The Circuit Court expressing itself in the oral argument that a "forgery" is not "newly discovered evidence" within the meaning of the rule, denied the motion, exception noted in that court.

Circuit Court Affirmed Without Opinion on Merits.

In the Circuit Court of Appeals the appellant also filed opening and closing briefs and a separate statement of jurisdiction together with all the statutes involved and the questions presented by the appeal. The Circuit Court, holding that no "specification of errors" had been filed pursuant to its rules, affirmed the judgment without opinion on the merits of each of the questions raised.

Questions Presented by This Appeal.

1. Whether the seizure by an F. B. I. agent of a personal check, [Government's Exhibit 7], which he requested and employed to take from the defendant's files without a search warrant and used to convict petitioner violated his rights under the Fourth and Fifth Amendments to the Constitution of the United States. Whether the timely motion to suppress this check in advance of trial should have been granted and whether the motion to strike it from the evidence in the trial should have been granted.

2. Whether the seizure of books and records on an insufficient affidavit of probable cause, and their introduction in evidence over timely objections, violated petitioner's rights under the Fourth and Fifth Amendments to the U. S. Constitution.

3. Whether the right of particular agencies of the government as authorized by Congress and the President, to audit and inspect certain government contractor's books and records and files permits another branch of the government, not so authorized, to seize such books and records without a search warrant and use them in evidence in a criminal prosecution.

4. Whether on a motion to suppress the evidence and return the articles illegally seized the accused may produce oral testimony and call hostile witnesses both before and during trial.

5. Whether upon the trial of the case he is permitted to renew his motion and take oral testimony, or whether the trial court may decline to hear the evidence and deny the motion.

6. Whether an accused, suspecting that his indictment is based upon documents, books and records illegally

seized, may inspect the minutes of the grand jury to see if those documents have been used to bring about his indictment.

7. Whether a grand jury or petit jury selected entirely from and composed entirely of men in a state where doormen have sat on the grand and petit juries for years was illegally constituted.

8. Whether in an indictment charging the filing of a false claim by a Navy prime contractor the indictment is insufficient to inform the accused of the nature and cause of the accusation under the Sixth Amendment where it fails to set out the claim.

9. Whether after the jury was impanelled and sworn the trial court adopted the correct procedure in excusing a juror without the personal knowledge or consent of the accused.

10. Whether the trial court erred in failing to sustain the demurrer to the indictment where the indictment in Count IV alleged the presentation of a false claim without specifying the claim or setting it up.

11. Whether Count V alleged duplicitously concealment and covering up a material fact and at the same time making a false statement.

12. Whether the trial court erred in failing to sustain the demurrer to the indictment as failing to state a public offense in Count V in failing to set up the alleged false statement and the authority of the person to whom the alleged false statement was made.

13. Whether the trial court erred in failing to grant the request for a bill of particulars as to Counts IV and V where the petitioner had none of the information requested and necessary for his defense.

14. Whether the trial court erred in failing to continue the trial at petitioner's request for ten days because he could not get access to data necessary for his defense.

15. Whether the acquittal of Scott, in a case tried on the theory of a joint conspiracy between Scott and Zap, necessarily acquitted Zap.

16. Whether the court's instruction to the jury to disregard Scott who was named in the indictment, vitiated the indictment.

17. Whether a civilian cost inspector could give permission to someone outside of the list named by the president of the United States in his executive order to examine defense contractor's records.

18. Whether the elimination of women from the grand jury or petit jury invalidated the indictment, as not having been returned by a properly constituted grand jury.

19. Whether the trial court should have directed the verdicts for insufficiency of the evidence as to Count IV where the evidence showed that there was no claim for $4000 as alleged, but one for $4300; where it was shown that the contractor had obligated himself in excess of $4000 for the services involved; where the claim was prepared by the navy auditors themselves after their own audit, and was countersigned by a navy commander and navy ensign cost inspector as true and correct and where there was no proof of guilty knowledge or wilfulness as required by the statute.

20. Whether the trial court should have directed the verdicts for insufficiency of the evidence as to Count V which charged petitioner with falsifying and concealing a material fact and making a false and fraudulent state-

ment to Hilton Byers when the testimony fails to show a statement to Hilton Byers as alleged.

21. Whether the trial court erred in implicitly holding that a defense prime contractor is responsible for the acts of his employees, even though done without his knowledge, in the face of the statutory requirement that the offenses are only committed "knowingly" and "wilfully."

22. Whether the trial court erred in failing to give the jury any instructions on the statute charged to have been violated (Title 18, Section 80) or definitions of the words used in the statute.

23. Whether the trial court erred in giving an instruction over objections and exceptions that the word wilful is used in the statute in this case and means ". . . . conduct marked by careless disregard as to whether or not the thing done is lawful" [R. 689], which is contrary to the plain language of the statute.

24. Whether the trial court erred in giving an instruction singling out the defendant who took the witness stand, that it is proper for the jury to consider "the interests that the defendant may have in the case, his hopes and fears and what he has to gain or lose as a result of your verdict." [R. 686.]

25. Whether the trial court erred in failing to give requested defense instructions defining what constituted a claim within the meaning of the statute and what could be considered by the jury in respect thereto. (Defense Instruction 39 [R. 764]; and 43 [R. 766]; 44 [R. 767].)

26. Whether the trial court erred in failing to give proffered instructions that the petitioner had a right to rely on the accuracy of his own auditors and also on the

inspection of the navy cost auditors in considering his good faith, his lack of guilty knowledge or wilfulness, which instructions were refused and exceptions noted. (Instructions 40, 41, 42, 46 [R. 764-772]; 48, 49, 50, 52.)

27. Whether the trial court erred in admitting books and records in evidence which were not made by him and the contents of which he had no knowledge.

28. Whether the trial court erred in failing to arrest judgments in the case for insufficiency of and defects in the indictment.

29. Whether the trial court erred in imposing separate punishments on each of the counts involving the same transaction.

30. Whether the Circuit Court of Appeals for the Ninth Circuit erred in failing to remand the case under Rule 111, Subdivision 2 for consideration of a motion for new trial on the ground of newly discovered evidence immediately after the close of the trial where such evidence consisted of forgery of a document used to convict petitioner.

31. Whether the Circuit Court of Appeals erred in holding that there were no *specification of errors* as required by its rules, although appellant set out the "questions specifically presented" and presented the errors fully.

32. Whether the Circuit Court erred in deciding the case without an opinion on the merits of the many questions raised.

Reasons for Allowance of the Writ.

I.

The Circuit Court of Appeals has decided important questions of Federal Law without opinion on the merit which have not been, but should be, settled by the Supreme Court.

1. (a) Whether oral testimony may be taken of government agents on motions to suppress and return evidence; (b) whether rulings on motions to suppress evidence in advance of the trial are "the law of the case" or whether, upon their renewal in the trial the trial judge must again consider the admissibility of such illegally seized evidence; **whether government agents in a department not specifically designated by the president under Executive Order 9127 under the First War Powers Act are authorized to inspect, search or seize a prime defense contractor's books and records without a proper search warrant under a proper and lawful affidavit, showing probable cause. Whether they have such right even with a search warrant unless specifically permitted by executive order.**

2. Whether the seizure of a private check of petitioner and used to convict petitioner [Govt. Exhibit 7] violated petitioner's rights under the Fourth and Fifth Amendments to the Constitution of the United States.

3. Whether an indictment charging presentation of a false claim which fails to set up the claim fails to inform the accused of the nature and cause of the accusation as required by the Sixth Amendment to the Constitution of the United States.

4. Whether in a state which has had women in state courts on grand juries and petit juries a grand jury selected only from men and consisting only of men violates the congressional mandate.

5. Whether a trial court must define the offenses charged to the jury.

6. Whether an instruction that "careless disregard" of the thing done is error under a statute requiring specific knowledge and fraudulent intent.

7. Whether the verdict should have been directed for insufficiency of the evidence.

II.

The Circuit Court of Appeals has decided several Federal Questions in a way probably in conflict with the applicable decisions of the Supreme Court.

III.

This Court under its Supervisory Control of Criminal Procedure should pass upon several procedural matters of importance raised by this appeal, to-wit:

Whether oral testimony may be taken of government agents on motions to suppress and return evidence illegally seized; whether the hearing in advance of trial is the "law of the case" so as to preclude renewal at the trial and the taking of oral evidence at the trial; whether a federal court has jurisdiction on a motion to return books and papers held by another branch of the government solely for safekeeping, and whether fair trial has been accorded

where a continuance for ten days is denied at date first set for trial to make available papers in possession of government; whether an indictment for presentation of a false claim states an offense without setting forth the claim and whether a bill of particulars is required; whether a defendant is "present" within the meaning of the law where proceedings are had outside the hearing or knowledge of the defendant at the judge's bench to excuse a juror and the defendant's consent is not obtained; whether the trial court must tell the jury and define the statute and the offense to the jury upon which the accused is being tried;

Whether an instruction to the jury that the word "wilfully" means "a thing done . . ." by "conduct marked by careless disregard as to whether or not the thing done is lawful" under a statute requiring specific knowledge and intent, is erroneous.

Whether, upon the discovery of a forgery of a document used to convict appellant immediately after trial of the case a motion to remand the case for a new trial will lie under Rule III, Subd. 2 Rules of Criminal Procedure.

Whether a specification of the questions raised by the appeal in the Circuit Court of Appeals is sufficiently presented when it is set forth as "questions presented by this appeal."

Cases and Statutes Believed to Sustain Jurisdiction.

United States Codes, Title 28, Sec. 347;

Boyd v. U. S., 116 U. S. 616, 29 L. Ed. 746;

Amos v. U. S., 255 U. S. 313, 65 L. Ed. 654;

Goldman v. U. S., 86 L. Ed. 1322;

Olmstead v. U. S., 277 U. S. 438, 72 L. Ed. 944;

Gouled v. U. S., 65 L. Ed. 654;

Weeks v. U. S., 232 U. S. 383, 58 L. Ed. 652;

McNabb v. U. S., 87 L. ed. 819;

U. S. v. Cruickshank, 92 U. S. 542, 23 L. Ed. 588;

U. S. v. Simmons, 96 U. S. 360, 24 L. Ed. 819;

Edwards v. U. S., 312 U. S. 473.

Statutes on Search and Seizure:

U. S. Codes, Title 18, Sec. 611-618;

Fourth and Fifth Amendments U. S. Constitution.

Inspection of War Plants:

U. S. Code, Title 50, App. Sec. 643;

Executive Order No. 9127, April 10, 1942, 7 F. R. 2753;

Statute on Selection of Jurors, Title 28, Sec. 411;

Code of Civil Procedure of State of California, Section 204.

A supporting brief is being prepared and filed separately.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioner.

APPENDIX

Statutes Involved.

Sec. 80. (*Criminal Code, Section 35 (a).*) *Presenting False Claims.* Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (Mar. 4, 1909, c. 321, Sec. 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015; June 18, 1934, c. 587, 48 Stat. 996; April 4, 1938, c. 69, 52 Stat. 197.)

The Fourth Amendment to the Constitution of the United States, which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the Untied States, which provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, *without due process of law;* nor shall private property be taken for public use, without just compensation."

Title 18, Section 611, which provides:

> "A search warrant authorized by this chapter may be issued by a judge of a United States district court, or by a judge of a State or Territorial court of record, or by a United States commissioner for the district wherein the property sought is located."

Title 18, Section 612:

> "A search warrant may be issued under this chapter upon either of the following grounds:

"1. When the property was stolen or embezzled in violation of a law of the United States; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.

"2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.

"3. When the property, or any paper, is possessed, controlled, or used in violation of section 98 of this title; in which case it may be taken on the warrant from the person violating said section, or from any person in whose possession it may be, or from any house or other place in which it is concealed."

Title 18, Section 613:

"A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched."

Title 18, Section 614:

"The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them."

Title 18, Section 615:

"The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist."

Title 18, Section 616:

"If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause of its issue and the names of the persons whose affidavits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner."

Title 28, Section 411, United States Codes, provides:

"Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."

Code of Civil Procedure of the State of California, Section 204, which provides:

"Jury lists: By whom and when made. In the month of January in each year it shall be the duty of the superior court in each of the counties of this

State to make an order designating the estimated number of grand jurors and also the number of trial jurors, that will, in the opinion of said court, be required for the transaction of the business of the court, and the trial of causes therein, during the ensuing year; and immediately after said order designating the estimated number of grand jurors shall be made, the court shall select and list the grand jurors required by said order to serve as grand jurors in said superior court during the ensuing year, or until new lists of (of) jurors shall be provided, and said selections and listings shall be made of *men and women* suitable and competent to serve as jurors, as set forth and required in sections 205 and 206 of this code, which list of persons so selected shall at once be placed in the possession of the county clerk; and immediately after said order designating the estimated number of trial jurors shall be made, the board of supervisors shall select, as provided in sections 205 and 206 of this code, a list of *men and women* to serve as trial jurors in the superior court of said county during the ensuing year, or until a new list of jurors shall be provided."

U. S. Code Annotated, Title 50, War, p. 282, provides as follows:

"643. Plant, books, and records of war contractors; definition of defense contract; agency designated to administer provisions.

"The provisions of section 10 (1) of an Act approved July 2, 1926 (44 Stat. 787; 10 U. S. C. 310 (1) (giving the Government the right to inspect the plant and audit the books of certain Contractors) shall apply to the plant, books, and records of any contractor with whom a defense contract has been placed at any time after the declaration of emergency

on September 8, 1939, and before the termination of the present war: Provided, That, for the purpose of this title, the term 'defense contract' shall mean any contract, subcontract, or order placed in furtherance of the defense or war effort: And provided further, That the inspection and audit authorized herein, and the determination whether a given contract is a 'defense contract' as defined above, shall be made by a governmental agency or officer designated by the President, or by the Chairman of the War Production Board." Mar. 27, 1942, 3 p.m., E.W.T., c. 199, Title XIII, 1301, 56 Stat. 185.

EXECUTIVE ORDER NO. 9127

April 10, 1942, 7 F.R. 2753

INSPECTION OF PLANTS AND AUDIT OF BOOKS OF DEFENSE CONTRACTORS

"By virtue of the authority vested in me by the Constitution and laws of the United States, and particularly by Title I of the First War Powers Act, 1941 (sections 601 *et seq.* of this Appendix), as President of the United States and Commander in Chief of the Army and Navy of the United States, and in order to prevent the accumulation of unreasonable profits, to avoid waste of Government funds, and to implement other measures which have been undertaken to forestall price rises and inflation, it is hereby ordered as follows:

"1. I hereby designate the War Production Board, the War Department, the Navy Department, the Treasury Department, the United States Maritime Commission, and the Reconstruction Finance Corporation as the governmental agencies authorized to inspect the plant and to audit the books and records, as provided by Title XIII of the said Second

War Powers Act, 1942. Such inspection and audit and the determination whether a given contract is a defense contract, as defined in Title XIII of the Second War Powers Act, 1942, may be made in the case of (a) any contractor with whom a defense contract has been placed by such agency, or, in the case of the Reconstruction Finance Corporation, by any corporation created or organized by it, at any time after the declaration of emergency on September 8, 1939, and before the termination of the present war, and in the case of (b) any subcontractor performing work required by any such defense contract. The Chairman of the War Production Board is authorized to issue rules and regulations and to establish policies to coordinate and govern the War Department, the Navy Department, the Treasury Department, the United States Maritime Commission, and the Reconstruction Finance Corporation in exercising the functions vested in them by this order.

"2. The authority herein conferred may be exercised by the Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the United States Maritime Commission, and the Board of Directors of the Reconstruction Finance Corporation, respectively, or in their discretion and by their direction, respectively, may be exercised also by and through any officer or officers or civilian officials of their respective departments and agencies designated by them for those purposes. The Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the United

States Maritime Commission, or the Board of Directors of the Reconstruction Finance Corporation may authorize such officer or officers or civilian officials of their respective departments or agencies to make further delegations of such powers and authority within their respective departments and agencies.

"3. In inspecting any plant engaged in producing, manufacturing, processing, constructing, altering, or repairing any defense article of a secret, confidential, or restricted nature, or which is produced, manufactured, processed, constructed, altered, or repaired in accordance with or under any secret process, formula, patent, or invention, and in auditing the books and records in connection with any such defense contract, such inspection shall be regarded as secret, confidential, or restricted, as the case may be, and all reports, records, papers, documents, and writings relating to such inspection or audit shall be marked or stamped as secret, confidential, or restricted, as the case may be, and shall be handled in accordance with regulations prescribed and in force in the department or agency concerned relating to the handling of secret, confidential, or restricted matters, reports, records, papers, documents, and writings.

"4. The power to administer oaths or affirmations and to issue subpoenas for the attendance of witnesses or the production of books, records, or other documentary or physical evidence deemed relevant to the inquiry, conferred by section 1302, and, through the Department of Justice, the power to invoke the aid of any court of the United States, conferred by section 1303, Title XIII, of said Second War Powers

Act, may be exercised, performed, or carried out by the Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, any member of the United States Maritime Commission, or the Chairman of the Board of Directors of the Reconstruction Finance Corporation, as the case may be, or by such other officer or officers or civilian officials as may be authorized, empowered or directed by any of them so to do for his respective department or agency.

"5. Nothing herein shall affect or limit the authority and power conferred upon or granted to the Chairman of the War Production Board by Title XIII of said Second War Powers Act, 1942."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 489

EDWARD F. ZAP,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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In the Circuit Court of Appeals, the appellant filed his brief, together with a statement of jurisdiction on appeal, which was printed as a separate document and copies of which have been furnished to this court. Commencing on page 7 of the Jurisdictional Statement, to and including page 22, under the heading "C," the appellant presents forty-one questions raised by the appeal 79

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

EDWARD F. ZAP,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit has not yet been reported. It is contained in the record. [R. 805.] There was no opinion in the District Court.

Statement of the Case.

Reference is made to the Summary and Short Statement of the case in the petition.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 347, United States Codes. The Circuit Court of Appeals affirmed Counts IV and V June 4, 1945. Appellant duly and regularly petitioned for rehearing, which was denied by the court September 13, 1945. [R. 809.]

Statutes Involved.

Title 18, Section 80 (presenting false claims). The Fourth and Fifth Amendments to the U. S. Constitution; Title 18, Sections 611-616, regarding search warrants; U. S. Code; Title 50, Section 643 (First War Powers Act), and the President's Executive Order 9127; Title 28, Section 411, U. S. Codes, regarding selection of jurors according to state practice; Code of Civil Procedure of California, Section 204.

Specification of Errors.

The Court is respectfully referred to that part of the petition which sets forth the questions presented, and to that part which sets forth the reasons for the allowance of the writ. We set forth as specification of errors each of the matters therein set forth and as set forth in our assignment of errors in the record [R. 754-773] and the additional errors of procedure in the Circuit Court of Appeal.

SPECIFICATION OF ERRORS AND SUMMARY OF ARGUMENT.

I.

The evidence should have been suppressed as having been both searched and seized in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

A. The search and seizure were initially unlawful.

B. The affidavits for the search warrant were entirely insufficient under any circumstances.

C. The affidavit for the search warrants were based upon the initially unlawful search.

D. The illegal seizure was for the purpose of securing evidence in the case.

E. The trial court erred in not suppressing the evidence upon these facts.

F. No search warrant was ever sought or secured for the check for $4,000, but it was taken without any legal or lawful process.

G. The court erred in not taking oral testimony on the motion to suppress.

H. The court erred in not considering the offer of proof of evidence illegally searched and seized.

I. The Court erred in the trial of the cases in not striking the evidence illegally secured.

J. The court erred in not permitting the defendant to call FBI Agent Myerson to testify during the trial as to the manner of getting the evidence, and then overruling the offer of proof as to what that would show.

K. The court erred in not striking all the illegally secured evidence.

L. The trial court erred in receiving the books and records, volumes 34 to 45, in evidence over objections as to their unlawful search and seizure.

M. The trial court erred in not granting a new trial and in not arresting judgment where there had been an unlawful search and seizure in violation of the Fourth and Fifth Amendments. (Assignments of Error Nos. 12, 13, 15, 16, 17, 22, 23, 24.)

II.

Where Congress has by statute declared that certain agencies of the Government as designated by the president of the United States may inspect the books and records of war contractors, other agencies not so designated may not inspect the records or seize them for any purpose whatsoever and may not seize them without a proper search warrant or even with a proper search warrant, as the safety and secrecy of the matters involved require this construction.

III.

The District Court erred in not sustaining the Demurrer to the Indictment on the ground that it violated the Sixth Amendment to the U. S. Constitution, where, in Count IV, the alleged claim was not set forth and in Count V the alleged material fact concealed or false or fraudulent statement was not set forth, and thus is fails to inform the accused of the nature and cause of the accusation. [Assignment of Errors 1, 2, 3, 4, 6, 7, 10, 11, R. 755, 756.]

IV.

The District Court erred in denying a bill of particulars. [Assignment of Errors 8, R. 756.]

V.

The District Court erred in overruling the plea in abatement and the objection to the jury being composed entirely of men. [Assignment of Errors 9, R. 756.]

VI.

The District Court erred in refusing to order the return to the defendant of the papers and documents which Commander Smith had in his custody so that he could prepare his defense. [Assignment of Errors 19, R. 758.]

VII.

The District Court erred in its procedure relative to the discharge of Juror No. 2, and in holding the hearing outside of the hearing of the defendant and in excusing said juror without the defendant's consent. [Assignment of Errors 21, R. 758.]

VIII.

The trial court erred in failing to direct the Verdict in this case. [Assignment of Error 26.]

IX.

The exoneration of defendant Scott entitled Zap to a directed verdict also.

X.

The court erred in altering the indictment by his instructions!

XI.

The court below failed to instruct the jury on the statute and law applicable to the case and the decision of this court is therefore implicitly in conflict with the case of Corson v. U. S., 147 Fed. (2d) 439, and with Screws v. U. S. (1945), 89 L. Ed. 1029.

XII.

The District Court erred in instructions given and refused.

XIII.

The trial court erred in refusing to arrest judgment.

XIV.

In the Circuit Court of Appeals the appellant filed his brief, together with a statement of jurisdiction on appeal, which was printed as a separate document and copies of which have been furnished to this court. Commencing on page 7 of the jurisdictional statement, to and including page 22, under the heading "C," the appellant presents forty-one questions raised by the appeal.

XV.

The Circuit Court erred in not remanding the case for the taking of testimony and hearing on a motion for a new trial because of a forgery of a document presented in evidence against petitioner.

ARGUMENT.

I.

The Evidence Should Have Been Suppressed as Having Been Both Searched and Seized in Violation of the Fourth and Fifth Amendments to the Constitution of the United States. [Assignments of Error 12, 13, 15, 16, 17, 22, 23, 24, R. 756-758.]

The record shows the following factual situation with reference to the search warrant.

On November 5, 1942, Murray B. Myerson asked Ethel Boyle, a bookkeeper in the office of Mr. Zap, to give him the check for $4,000 on Zap's personal account in which she had subsequently and without Zap's knowledge typed in the name of William H. McAvoy and had also deposited it in the bank, without the knowledge of Mr. Zap. Myerson seized the check without any search warrant or other legal process, and it later became Government's Exhibit 7 in evidence after timely motions before trial to suppress the same were denied, and subsequent motions to strike and to suppress were denied. [Exceptions noted, R. 204, 243, 380.]

From October 20 until December 1, 1942, FBI agents Murray B. Myerson and James C. Sloan daily searched said premises at 1005 Broxton Avenue, without any search warrant, going through books, papers, and records. [See affidavits of Ethel Boyle, R. 154; Estelle Zap, R. 157, and Edward F. Zap, R. 146.]

Myerson, in his affidavit of Dec. 1, 1942, for a search warrant to search the premises at 1005 Broxton Avenue, however, as his basis for the search, averred "that this affidavit is made for the purpose of securing a warrant for the search of the premises known and described as fol-

lows: The two ground floor rooms of the premises occupied by E. F. Zap Aeronautical Engineers, and located at 1005 Broxton Avenue, Westwood Village, California; *that affiant was on the above premises by reason of a previous search warrant and observed the hereinafter described books and documents.*" [R. 178.] (Italics ours.) The United States Commissioner acted on this affidavit. [R. 177-179.]

The documents described in the application of December 1, 1942, are listed on page 178 of the record. They do not include the $4,000 check which forms the basis of the convictions on Counts IV and V. They do include books and records introduced over objections on all counts. There is nothing in the application for a search warrant to show probable cause for suspecting there had been a violation of Sections 80 or 83, Title 18, U. S. C., nor that the documents sought were instrumentalities of a crime.

The District Court erred in refusing to suppress the evidence upon the timely motions upon the following grounds:

1. There was an illegal search of the premises which admittedly commenced on October 20, 1942, before the issuance of any search warrants of any kind or character.

2. There was no denial of illegal seizure of the $4,000 check seized on November 5, 1942, without a search warrant of any kind or character.

3. The search of the premises was illegal from October 20th until December 1st when there was no warrant of any kind for the search for the things which were subsequently taken as a result of this search.

4. The affidavit upon which the search of 1005 Broxton Avenue was based was insufficient. It failed to set forth any facts justifying either a search or a seizure, and it failed to set forth any reasonable or probable cause. Therefore both the affidavit and the search warrant of December 1, 1942, were illegal.

5. The officers made the seizure of Exhibit 7 without any search warrant.

6. The officers swore that they made the seizures of December 1, 1942, upon the basis of the purported search warrant of that date based upon alleged observations during their search upon the previous warrant.

The case should therefore be reversed because of use of evidence unlawfully both *searched* and *seized* in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

The errors under this heading will be divided and treated under the following subheads:

A. The search and seizure were initially unlawful.

B. The affidavits for the search warrant were entirely insufficient under any circumstances.

C. The affidavit for the search warrants were based upon the initially unlawful search.

D. The illegal seizure was for the purpose of securing evidence in the case.

E. The trial court erred in not suppressing the evidence upon these facts.

F. No search warrant was ever sought or secured for the check for $4,000, but it was taken without any legal or lawful process.

G. The court erred in not taking oral testimony on the motion to suppress.

H. The court erred in not considering the offer of proof of evidence illegally searched and seized.

I. The court erred in the trial of the cases in not striking the evidence illegally secured.

J. The court erred in not permitting the defendant to call FBI Agent Myerson to testify during the trial as to the manner of getting the evidence, and then overruling the offer of proof as to what that would show.

K. The court erred in not striking all the illegally secured evidence.

L. The trial court erred in receiving the books and records, volumes 34 to 45, in evidence over objections as to their unlawful search and seizure.

M. The trial court erred in not granting a new trial and in not arresting judgment where there had been an unlawful search and seizure in violation of the Fourth and Fifth Amendments.

Besides the search warrant issued October 31, 1942, directing a search of the premises at 1005 Broxton Street, there was a search warrant issued December 1, of the same year, directing a search of the same premises. The warrant of October 31, however, directed a search only for certain checks and stubs later suppressed while that of December 1st directed a search for all of the papers, books and documents we have mentioned in the discussion of this subject.

The latter search warrant of December 1, 1942, therefore is the one relied upon to justify the seizure of these

papers. If it was insufficient or if the affidavit upon which it was based was insufficient then the timely motion to suppress should have been granted; the books and documents seized were used as evidence by the Government and a conviction followed their use over timely and repeated objections. This affidavit follows:

> "That this affidavit is made for the purpose of securing a warrant for the search of the premises known and described as follows:
>
> > The two ground floor rooms of the premises occupied by E. F. Zap Aeronautical Engineers and located at 1005 Broxton Avenue, Westwood Village, Los Angeles, California. That affiant was on the above premises by reason of a previous search warrant and observed the hereinafter described books and documents.
>
> That, by reason of the above facts, affiant says that at the above described premises, there is now unlawfully possessed and kept the following described property, articles and things:" [Listings, ledgers, transfer sheets, etc.]

The search warrant of December 1, 1942, is based upon the affidavit of Myerson alone. We challenge the Government to point to a single fact alleged in that affidavit from which it can be ascertained that there was probable cause (see Fourth Amendment and Title 18, Section 613). The only allegation remotely tending to justify the issuance of the warrant is that "by reason of the above facts there is now unlawfully possessed and kept the following described property, articles and things." (See *Agnello v. U. S.*, 70 L. Ed. 145; *Grau v. U. S.*, 77 L. Ed. 212.)

That this is a mere legal conclusion is most evident. No doubt Mr. Myerson thought it was unlawful for appellant to possess anything which the affiant regarded as suspicious. Indeed the "unlawfulness" of the possession is cast in the form of a conclusion drawn from "the above facts." But what facts? There is not a single one in the affidavit inconsistent with the innocence both of the possession and the things possessed. Myerson might with perfect safety make similar allegations as to every dollar on deposit in any bank or any merchandise on the shelves of any store. Here is not even the shadow of probable cause nor the ghost of safety from harsh, oppressive and tyrannical invasion of privacy and seizure of property.

The warrant recites that "by reason of violations of 18 U. S. C. A. 80 and 83 a search warrant is desired," etc., but there is not a word in the affidavit from which it can be inferred that any such violation had occurred much less that these books and papers had been used in the violation.

Moreover the warrant itself shows on its very face that its purpose was to seize the described personal property for the purpose of using it as evidence against appellant—the very thing the Supreme Court in the *Gouled* case said could not be done.

But we need not argue the insufficiency of the warrant for the insufficiency of the affidavit is apparent upon a mere inspection.

> "A search warrant may issue only upon evidence which would be competent in the trial of the offense before a jury and would lead a man of prudence to believe that the offense had been committed."
>
> *Grau v. U. S.*, 77 L. Ed. 212-214.

Measured by this standard the affidavit in support of this search warrant under which the papers were seized was clearly insufficient. The motion for their return and to suppress them should have been granted. For this errer, even if there were no other, there must be a reversal.

In *United States v. Reily*, 78 L. Ed. 159, the court said:

> "The search warrant was void as it was issued on an affidavit which contained no facts on which to base a finding of probable cause.
>
> "*Re* Rule of Court (C. C.), 3 Woods 502, Fed. Cas. No. 12,126; United States v. Lefkowitz, 285 U. S. 452, 464, 76 L. ed. 877, 882, 52 S. Ct. 420, 82 A. L. R. 775; Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, 34 S. Ct. 341, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177; Byars v. United States, 273 U. S. 28, 29, 71 L. ed. 520, 522, 47 S. Ct. 248; Giles v. United States (C. C. A. 1st), 284 Fed. 214; United States v. Harnich (D. C.), 289 Fed. 256; Veeder v. United States (C. C. A. 7th), 252 Fed. 414; Go-Bart Importing Co. v. United States, 282 U. S. 344, 75 L. ed. 374, 51 S. Ct. 153.
>
> "An affidavit under the Tariff Act must contain more than an affirmation of suspicion.
>
> "United States v. Federal Mail Order Corp (C. C. A. 2d), 47 F. (2d) 164; *Re* Chin K. Shue (D. C.), 199 Fed. 282; Pappas v. Lufkin (D. C.), 17 F. (2d) 988; United States v. Clark (D. C.), 18 F. (2d) 442."

A search cannot be made on mere suspicion, and cannot take place where there is not probable cause.

United States v. O'Connell, 43 Fed. (2d) 1005. The court there said:

> "No basis for the belief as set up. Certainly a statement of an official that a person was known to him as a bootlegger could not be received in any court as a statement of fact upon which a judicial declaration might be made."

See, also:

Brown v. United States, 4 Fed. (2d) 246.

In *Nathanson v. United States*, 290 U. S. 41, 78 L. Ed. 159:

> "The search warrant was void as it was issued on an affidavit which contained no facts on which to base a finding of probable cause." (78 L. Ed. 159.)

See, also:

Korler v. U. S., 9 F. (2d) 23;
Dandrea v. U. S., 7 F. (2d) 861;
Salaka v. U. S., 286 F. 125;
Giles v. U. S., 284 F. 208;
Lochnane v. U. S., 2 F. (2d) 427;
In re No. 191 Front St., 5 F. (2d) 282;
Wagner v. U. S., 8 F. (2d) 581;
U. S. v. Casuns, 286 F. 976;
Tynan v. U. S., 297 F. 179;
Woods v. U. S., 279 F. 706.

This affidavit was equally void in forming the basis of any search or seizure.

The affidavit of Champlin, which formed the basis of the alleged search and seizure, was dated October 31st, 1942. [R. 187, 188.] The document does not describe any books, papers or records which it is intended to have seized. It is based on hearsay and conclusions of the affiant. There is nothing in this affidavit that relates to any books, papers or records and nothing with relation to any check of the Edward F. Zap Aeronautical Engineers for $4,000. There is no showing of reasonable or probable cause of any false or fraudulent claim. There is no allegation of probable cause to believe or suspect that such a crime had been or was being committed or that there were any papers or documents that were *instrumentalities of a crime.* The affidavit, therefore, was entirely insufficient to furnish the basis of a search or seizure of any books, papers or records.

Gouled v. United States, 65 L. Ed. 647.

There was a search warrant issued October 31, 1942, directing the search of the premises at 1005 Broxton Street. We think the affidavit of Harry Champlin, upon which it was based, is clearly insufficient to support it.

Gouled v. U. S., 65 L. Ed. 647;
Amos v. U. S., 65 L. Ed. 654;
Dandrea v U. S., 7 F. (2d) 861;
Taylor v. U. S., 286 U. S. 1;
Amos v. U. S., 65 L. Ed. 654.

That grave error was committed in denying appellant's motion to suppress and return as evidence papers and documents seized from the residence and place of business of appellant does not seem to admit of the slightest doubt. In our view of this matter it is decisive of this appeal.

Appellant's Notice of Motion to suppress was verified March 4, 1943. [R. 127, 128.] His motion to suppress was sworn to upon the same date. [R. 128, 133.] He alleges that the papers, books and documents were first removed without a search warrant [R. 131]. Confining ourselves for the present to the search of the place of business, he presents the affidavit of Ethel Boyle [R. 151], from which it appears that the books, papers and documents for which Myerson applied and which as we have shown, he described only in vague, general terms could not have been sufficiently identified even for that meager description except upon a search covering a long period of time. The affidavit of Edward F. Zap as to what Myerson and Sloane did, and said in his presence, is undenied. [R. 146-8.]

This first search at 1005 Broxton Avenue was itself, therefore, illegal. It was without probable cause. It did not specify the thing to be seized. It resulted from a search illegal from the beginning.

It is thus evident that the second search was, according to Myerson's own affidavit, based on observations during the first purported search which was in itself illegal.

The Government cannot enter into a premise on an exploratory search and thereafter by reason of a search not based upon a proper affidavit thereby gain information and use it as a basis of another search warrant and thus legalize its first illegal act.

Silverthorne Lumber Co. v. United States, 64 L. Ed. 319;

Gouled v. United States, 65 L. Ed. 647;

Olmstead v. United States, 277 U. S. 438, 72 L. Ed. 944;

Byers v. United States, 71 L. Ed. 520;
Amos v. United States, 65 L. Ed. 654;
Agnello v. United States, 70 L. Ed. 145;
Weeks v. United States, 58 L. Ed. 52;
Goldman v. United States, 86 L. Ed. 1322;
Boyd v. United States, 29 L. Ed. 752.

The court therefore erred in permitting the use of the books, papers and records which were generally searched prior to December 1st, 1942, without any search warrant or other lawful process and which were seized on December 1st, 1942, pursuant to the alleged process based upon the illegal search which the officer admitted having conducted prior to December 1st, 1942.

This is distinctly pointed out in *Boyd v. United States*, 29 L. Ed. 746, and followed with approval by this court (Ninth Circuit) in *Takahashi v. United States*, 143 Fed. (2d) 118.

In the *Takahashi* case this court distinctly pointed out the difference between prohibited searches and seizures and pointed out that the Constitution forbids both *searches* and *seizures*.

It is evident that the Government relied on its search warrant at the time of the proceedings but that that search warrant was distinctly based on the illegal search which the officer admitted he made with a search warrant to cover the matters under search.

C.

But there is a second reason why this evidence should have been suppressed by the court below. It was evident that the search was made not to get instrumentalities of

crime but for the purpose of gathering evidence and this has never been permitted.

Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746;

Gouled v. United States, 65 L. Ed. 647;

Byers v. United States, 71 L. Ed. 520;

Amos v. United States, 65 L. Ed. 654;

Agnello v. United States, 70 L. Ed. 145.

D.

The District Court should have suppressed the check for $4000 both prior to the trial and during the trial.

The check for $4000 illegally seized was Exhibit 7. It was a check that had been signed in blank by McAvoy and Zap and later made out by Miss Ethel Boyle and deposited in the bank. It was a check of Edward F. Zap not on the business but on the separate personal account and was never submitted to the Navy.

It formed the basis of the conviction of Counts IV and V in the indictment.

The method by which this check was obtained was as follows: Ethel Boyle, the bookkeeper, stated in her affidavit as follows: That some time on or about November 5th, 1942, Murray Myerson came to her and said he wanted a check for $4000 which was made out to W. H. McAvoy. At that time he had no search warrant for the same and did not display any. That she showed where the check was in the file and he asked for it and she gave it to him. [R. 155.] Myerson then took it and it was later seen in the Government files by Zap and was produced in court at the time of trial.

This was an illegal search and seizure on November 5th. Nowhere is it claimed that Myerson or anyone had a search warrant for this check or that he ever received a search warrant to seize this check on November 5th, 1942.

The defendant therefore was entitled to a specific suppression of this evidence at the time he made his motion on March 15th, 1942, before Hon. Leon Yankwich, Judge of the District Court, where the motion was denied and exception was allowed.

Weeks v. United States, 58 L. Ed. 52;
Gouled v. United States, 65 L. Ed. 647;
Boyd v. United States, 29 L. Ed. 752;
Amos v. United States, 65 L. Ed. 654;
Agnello v. United States, 70 L. Ed. 145;
Goldman v. United States, 86 L. Ed. 1322.

E.

The District Court erred in failing to allow the taking of oral testimony of Murray Myerson regarding this check.

At the time of the hearing on the motion for the suppression and return of the evidence the notice of motion was that the defendant would move to suppress all the evidence illegally searched or seized or taken, the said motion being based upon the ground that the affidavit forming the basis of the search was illegal; that it was based upon an insufficient affidavit of Harry Champlin and that the search warrant itself was therefore void [R. 130, 131]; that papers, records, documents and files located in the office of E. F. Zap at 1005 Broxton Avenue were removed without a warrant or legal authority in

violation of the constitution of the United States [R. 131]; that they were photostated; that there was no legal authority to make either the search or the subsequent search and seizure, that of December 1st [R. 132];

That the notice of motion provided that it would be based upon all the records and the files in the case and upon the affidavit of E. F. Zap, *"and upon any testimony to be produced orally at said time and place."* (Italics ours.) [R. 135.]

At the time of the oral hearing Special Agent Murray Myerson was in court and the defendant's counsel wanted to call him to the witness stand as well as other witnesses. The District Court refused the request and allowed an exception. [R. 34, 236, 369.]

At that time the defendant stated that it was not possible for defendant to get an affidavit from an FBI investigator who was hostile to the defendant and that his only power to produce the testimony was to call him, but the court refused the request. Thereupon at the time of filing of other affidavits the defendant made an offer of proof of what Murray Myerson would testify to if called as a witness.

The offer of proof was stricken from the files on objections of the Government. It was filed five days after the oral hearing, at the time of filing additional affidavits. The Government objected that there was no provision for the taking of oral evidence at the hearing date set for March 15, 1943, and that no arrangements had been made prior to March 15 for the taking of oral evidence and that the court denied the right to take oral evidence. [R. 168.]

Again during the trial the defendant sought to call Myerson and Sloane. The request was denied. Objections to offer of proof was sustained upon Government objections. [R. 371-380.] **The rulings were erroneous.** There are three ways of producing testimony in court. One is by the oral testimony of the witnesses, the other is by affidavit and third by deposition.

When a witness is in court and is a witness whom a party desires to call in the furtherance of his cause the widest latitude should be allowed so that not only the court but the parties may have the benefit of examination, cross-examination and of observance of the witnesses.

In the present case Murray Myerson was a Government agent whose testimony could only be secured by putting him on the witness stand and we submit it was error to deny the movant that right on his motion to suppress the evidence made timely prior to trial.

Title 28, Section 635, U. S. Codes, provides as follows:

> "Proof in common-law actions. The mode of proof in the trial of actions at common law shall be *by oral testimony and examination of witnesses in open court*, except as hereinafter provided." (Italics ours.)

The taking of evidence by deposition and affidavit is also provided in succeeding sections of Title 28. However, the right to take testimony orally is guaranteed by Section 635 of Title 28, and the refusal of the court to permit the taking of oral testimony, as provided by that section, was a denial of a fundamental right. The situation in this case was that of the presence of a witness whose affidavit could not be obtained. He was present in court and the Government put him on with reference to

other matters in which it was interested, namely, to the excusing of a juror.

It certainly was the right of the defense to call him with reference to the important constitutional right of suppression of the evidence. The denial of that right requires a reversal of the judgment.

In *McNabb v. United States*, 87 L. Ed. 819, 827, the court said:

> "But where in the course of a criminal trial in the Federal courts it appears that evidence has been obtained in such violation of legal rights as this case discloses, it is the duty of the trial court to entertain a motion for the exclusion of such evidence and to hold a hearing, as was done here, to determine whether such motion should be granted, or denied. *Cf.* Gouled v. United States, 255 U. S. 298, 312, 313, 65 L. ed. 647, 654, 41 S. Ct. 261; Amos v. United States, 255 U. S. 313, 65 L. ed. 654, 41 S. Ct. 266; Nardone v. United States, 308 U. S. 338, 341, 342, 84 L. ed. 307, 311, 312, 60 S. Ct. 266."

F.

Again during the trial of the case the defendant renewed his motion to suppress the evidence and asked leave to call Myerson to the witness stand. The trial court, holding that Judge Yankwich had ruled on the matter, denied the motion. This was prejudicial error.

Gouled v. U. S., 65 L. Ed. 647;

McNabb v. U. S., 87 L. Ed. 819, 827;

Olmstead v. U. S., 277 U. S. 438;

U. S. v. Mattingly, 285 F. 922;
U. S. v. Fenton, 268 F. 221;
U. S. v. O'Dowd, 273 F. 600;
Pan Zech v. U. S., 285 F. 871.

A defendant who challenges a denial of his constitutional right may not only do so prior to trial but during the trial and the court is duty bound to consider the motions at either stage of the case and to consider all testimony relating thereto.

Weeks v. United States, 58 L. Ed. 52;
McNabb v. United States, 87 L. Ed. 579;
Takahashi v. United States, 143 Fed. (2d) 118;
Gouled v. United States, 65 L. Ed. 647;
Carroll v. United States, 69 L. Ed. 543;
Amos v. United States, 65 L. Ed. 654;
Byers v. United States, 71 L. Ed. 520;
Agnello v. United States, 70 L. Ed. 145.

G.

The trial court by the same reasoning erred in refusing to strike the evidence of the $4000 check on motion to strike. This motion to suppress the evidence had been timely made before the trial and it was made again on a motion to strike. This has been held to be proper proceeding.

Weeks v. United States, 58 L. Ed. 52;
Byers v. United States, 71 L. Ed. 520;
Agnello v. United States, 70 L. Ed. 145;
McNabb v. U. S., 87 L. Ed. 819, 827, and cases cited under F, *supra*.

H.

The District Court erred also in admitting in evidence over objections the Government's Exhibits 32 to 45. These documents, as to which the court had prior to trial denied a motion to suppress were admitted over objections of defendant that they were illegally searched and seized [R. 369], and with a desire on the part of the Government that a stipulation be entered in lieu of a motion to admit the books into evidence, which defense counsel declined. [R. 663.]

Right to be secure against such searches and seizures to have the evidence returned is upheld in

The Fourth and Fifth Amendments, U. S. Constitution;

Boyd v. United States, 116 U. S. 619, 29 L. Ed. 746, 6 S. Ct. 524;

Hale v. Henkel, 201 U. S. 43, 50 L. Ed. 652, 26 S. Ct. 370;

Silverthorne Lumber Co. v. U. S., 251 U. S. 385, 64 L. Ed. 319, 40 S. Ct. 182, 24 A L. R. 1426;

Carroll v. United States, 267 U. S. 132, 69 L. Ed. 543, 45 S. Ct. 280, 39 A. L. R. 790;

Go-Bart Importing Co. v. U. S., 282 U. S. 344, 75 L. Ed. 374, 51 S. Ct. 153;

Weeks v. U. S., 232 U. S. 383, 58 L. Ed. 652, 34 S. Ct. 341, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177;

Feldman v. U. S., 88 L. Ed. 1046;

Goldman v. U. S., 86 L. Ed. 1322;

Olmstead v. U. S., 277 U. S. 438, 72 L. Ed. 944.

In *Takahashi v. United States*, 143 F. (2d) 118, the Ninth Circuit Court held as follows:

> "But the authority to search cannot be confused with the authority to seize. It cannot be confused with the power to use seized articles in evidence. The Fourth Amendment prohibits unreasonable searches and seizures. The distinction has never been more carefully drawn than in the language used by Mr. Justice Miller in the concurring opinion in the case of Boyd v. United States, 116 U. S. 616, 641, 6 S. Ct. 524, 538, 29 L. Ed. 746. It is there said:
>
> 'The searches meant by the constitution were such as led to seizure when the search was successful.' And again: 'The things here forbidden are two: search and seizure.'"

I.

The District Court should have granted the motion to inspect the minutes of the Grand Jury because of the use of illegally secured evidence under the Fourth Amendment. (*U. S. v. Farrington*, 5 Fed. 343.) Had it disclosed illegally secured evidence, as the trial court assumed it might, then the motion to quash the indictment [R. 241] would have been appropriate. (*U. S. v. Robb*, 141 F. (2d) 45, 47.) If the indictment was based on illegally secured evidence it should have been quoted. (*U. S. v. Babb*, 141 F. (2d) 45.)

J.

The trial court erred in refusing to let Officer Myerson be called as a witness orally during the trial. [R. 380.] The right to have a hearing on the illegality of the evidence existed during the trial.

Gouled v. U. S., 65 L. Ed. 647;
McNabb v. U. S., 87 L. Ed. 579.

K.

The trial court erred in not striking the evidence illegally secured. [R. 369 *et seq.*] The motion to suppress the evidence may be made not only prior to trial, but may be renewed during the course of the trial.

In *Weeks v. United States*, 232 U. S. 383, 58 L. Ed. 652, the appellant petitioned the trial court prior to trial and again after the jury had been sworn, and before any evidence had been given, the defendant again urged his petition for the return of his property. Upon the introduction of such papers during the trial the defendant objected. The Supreme Court held that the application for the return of the papers prior to trial constituted a denial of the constitutional rights of the accused and that the trial court should have restored the letters to the accused. The court further said that in holding the property and permitting its use in the trial was prejudicial error, and held that "if these documents can thus be seized and held and used as evidence against a citizen accused of an offense, the protection of the 4th Amendment . . . is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

In *Gouled v. United States*, 65 L. Ed. 654, the court said:

> "The papers being of 'evidential value only,' and having been unlawfully seized, this question really is, whether, it having been decided on a motion before trial that they should not be returned to the defendant, the trial court, when objection was made to their use on the trial, was bound to again inquire as to the unconstitutional origin of the possession of them. . . . and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seiz-

ure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."

L.

For the foregoing reasons the court also erred in admitting into evidence Exhibits 34 to 45. [R. 663, 666.] Appellant vigorously objected under the Fourth and Fifth Amendments to the admission of these illegally seized books and records, and refused to waive the rights which he had protected. Under the ruling of the *Gouled* case it was error to admit these books and records into evidence.

It may be noted that the prosecution in the *Gouled* case was against Gouled, one Vaughan, an officer in the United States Army, and an attorney. The charge alleged defrauding the government on contracts for clothing and equipment in the last war. The court suppressed the evidence and answered a series of certified questions which, we think, are decisive in the case at bar.

M.

What we have said heretofore regarding the motions is equally applicable to our renewal of the grounds expressed on unlawful search and seizure on the motion for a new trial.

Weeks v. United States, 232 U. S. 392, 58 L. Ed. 655.

Go-Bart Importing Co. v. United States, 282 U. S. 374, 75 L. Ed. 344, said:

> ". . . Gouled v. United States, 256 U. S. 298, 307, 65 L. ed. 647, 651, 41 S. Ct. 261. The second clause declares, 'and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every state in the Union. Agnello v. United States, 269 U. S. 20, 33, 70 L. ed. 145, 149, 51 A. L. R. 409, 46 S. Ct. 4. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. Boyd v. United States, 116 U. S. 616, 623, 29 L. ed. 746, 748, 6 S. Ct. 524; Weeks v. United States, 232 U. S. 389-392, 58 L. ed. 654, 655, L. R. A. 1915B, 834, 34 S. Ct. 341, Ann. Cas. 1915C, 1177, *supra*."

As in the *Go-Bart* case, so here, there was a general, exploratory search, and as in that case, by pretension of right and threat of force, the investigators compelled the early inspection which they made and delivery of papers for search and seizure.

In the Circuit Court of Appeals the government admitted that the affidavits for the search warrants were insufficient, but contended that it had a right to inspect the defense

contractor's books and records and seize them without a proper search warrant.

When the motion to suppress the evidence was first made the government filed an affidavit of Hilton Byers in which he had given authority to the agents of the department of justice to inspect the books. [R. 194, 195.]

> "That at no time during said period did said Special [68] Agents of the Federal Bureau of Investigation make a search of said premises except upon two occasions when they appeared there with search warrants issued by the United States Commissioner in and for said District, and then and there they seized certain specifically designated books and records. That at all times during said period from on or about October 20, 1942, to and including the 1st day of December, 1942, all said books of account and records of Edward F. Zap pertaining to and under said contracts were within the custody of the United States Navy, pursuant to said contracts and the terms and provisions thereof, and said United States Navy refused and declined to permit any person whatsoever to remove any of said books of account and records, or either of them, without a warrant." [R. 195.]

The District Court denied the motion to suppress on the grounds urged by the government therein, and on its assertion that it relied solely on the search warrants for its seizure.

In the Circuit Court of Appeals the government conceded the warrants to have been based upon insufficient affidavits and without a showing of probable cause.

The government cannot rely upon a different ground than that acted upon by the trial court.

U. S. v. Bosoni, 57 F. (2d) 328.

II.

Where Congress Has by Statute Declared That Certain Agencies of the Government as Designated by the President of the United States May Inspect the Books and Records of War Contractors, Other Agencies Not so Designated May Not Inspect the Records or Seize Them for Any Purpose Whatsoever and May Not Seize Them Without a Proper Search Warrant or (Even With a Proper Search Warrant), as the Safety and Secrecy of the Matters Involved Show That This Construction Expresses the True Congressional Intent.

Congress authorized inspection of war contractor's records only by one of the agencies designated by the president. Title 50 App. 643 (First War Powers' Act) and Executive Order 9127. (See Appendix of Petition.)

It seems clear that this authority limits the right of inspection to the designated agencies and under the doctrine of *inclusio unis exclusio alterius* all others are necessarily excluded. The presidential order did not include the FBI. The Congressional purpose to keep matters confidential within the very departments and in fact only to the designated officers of the particular department having control of the contracts seems clear and sound. The Navy with its numerous auditors and inspectors did not need FBI auditors and they rightly protested against unauthorized inspections.

Unauthorized inspections by a collateral agency of the government might well open up secrets of the gravest

nature on a pretext of inspection. Thus, supposing that someone had reported a "war fraud" in the expenditure of huge sums of money (two billion dollars) for an "atomic bomb," and some FBI agents hearing of the same, or some ambitious investigators of the war fraud's unit, thinking they had made a big discovery, should decide to "inspect" the records of the defense plant. We respectfully submit that no authority existed for it, under the Executive Order 9127. The legal question is one of the greatest importance and should be decided by this court.

We believe that the statute and the authority pursuant thereto limiting the right of inspection, might equally be said to limit the right even of search and seizure, except upon executive order of the president or the particular head of an agency authorized by him to grant the authority. No such authority was asked for here, or granted.

In the instant case the contractor was experimenting with secrets of great importance, among which were the shortening of the takeoff of an airplane and its landing to enable it to do so in a much shorter distance than had previously been done from aircraft carriers.

FBI Agents Myerson and Sloane were therefore not permitted under statute to make any "inspection"—much less any search or seizure.

III.

The District Court Erred in Failing to Sustain the Demurrers to the Indictment and the Motion in Arrest of Judgment on the Ground That the Indictment Failed to Apprise the Court and Defendant of the Nature and Cause of the Accusation and Failed to State an Offense Against the Laws of the United States. [Assignment of Errors 1, 2, 3, 4, 6, 7, 10, 11, R. 755, 756.]

What the claim was is not specified.

The indictment further charged that Edward F. Zap and Lloyd Scott presented a claim "to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California." The defendant was entitled to know whether he, Zap, or Scott presented the same and to which Disbursing Officer it was presented, so that the defendants might present their defense.

The indictment further charged that said claim "falsely purported to be for expenses incurred by said defendants in paying William H. McAvoy for services falsely therein set forth to have been rendered by said McAvoy as a test pilot of aeronautical equipment pursuant to the aforementioned contract 83142." This allegation failed to set forth what expenses it was charged either defendant falsely purported to have paid to said McAvoy, or what services set forth were falsely claimed to have been rendered. (Nor was appellant in any way aided in this matter by a bill of particulars.)

Count V of the indictment is a pure conclusion of the pleader and fails to give the exact fact concealed or the purported false statement and representation which it was alleged was made to Hilton Byers. The court and appel-

lant was entitled to know the exact duties of Byers and the exact items for which William H. McAvoy was paid $2,375.00, and what the contract provisions were.

The charging part certainly fails to apprise the defendant of the nature and cause of the accusation of the indictment as to each count, as required by the Sixth Amendment to the Constitution of the United States.

In *United States v. Cruikshank*, 92 U. S. 558, the court said:

> "In criminal cases prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' Amend. VI, . . . : It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars.' 1 Arch. Cr. Pr. and Pl. 291 . . . . For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place and circumstances.
>
> "It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen.

The rule is further supplemented in the following cases:

United States v. Hess, 124 U. S. 483;

United States v. Carll, 105 U. S. 611;

Foster v. United States (9th Cir.), 253 Fed. 481.

In the present case the indictment alleges a claim without specifying what the claim was. It is a reasonable and fair assumption, and the record in this case shows that the contractor had thousands of claims against the Navy for work done. Here the claim is not identified in any way to the defendant. His records were in the custody of the government and it was impossible for him to tell or know what the claim was. He was entitled to know what the *claim* was and in what way it falsely purported to be for reimbursement for expenses, and what the alleged expenses were. The averments were pure conclusions of the pleader. They contained no detail which would inform the court in the first instance as to what the claim was and as to wherein it was alleged to have been false; second, to inform the defendant; and third, to be a bar to a second prosecution for the same or similar offenses.

The indictment further alleged that Edward F. Zap and Lloyd Scott presented the claim, and it was the defendant's right to know whether he or Lloyd Scott was the one referred to in the indictments in question.

It is the general rule in the courts of the United States that not only must the accused be informed with particularity, but also, where the charge involves a document, such as a forged instrument, claim or voucher, the defendant is entitled to have the pleadings set forth either the document or the substance thereof.

Count IV of the indictment is vague, indefinite and uncertain. This count fails to specify the claim which it is alleged was made upon the United States in violation of the statute.

Where an instrument is referred to, either to set forth the instrument in *haec verba* or give the substance of the instrument, in order to inform the accused of the nature and cause of the accusation, as required by the Sixth Amendment to the Constitution of the United States.

The charging part of the indictment in Count IV alleges that "on or about the 16th day of October, 1942, defendants Edward F. Zap and Lloyd Scott did make and present a claim for $4,000 upon the United States Navy for payment by presenting same to the disbursing officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California."

If there was a claim for $4,000 made to the disbursing officer of the United States Navy the government had the claim before it at the time it drew the indictment, and could have photostated the same or had it copied into the indictment in *haec verba*. As a matter of fact, the evidence in the case itself did not produce *any claim* for $4,000.

There was also a demand for a bill of particulars asking that the claim be set forth [R. 113]. The defendant was entitled to have the exact claim which the government intended to rely on set forth in the indictment and to be informed of it by a bill of particulars so that he could be prepared to meet it.

To show the great confusion over the alleged claim referred to in Count IV, at the time of the argument on the motion for a new trial even government counsel was confused in the belief that there was a claim for $4,000 and admitted that he was in error, that the claim he was talking about was for a different amount, namely, one for $4,300. The jury also was confused, because it re-

quested to have the indictment sent to the jury room and the court had to re-read the indictment to the jury as the jury was in the dark as to what was charged. The defendant not only could not tell from the indictment what instrument or claim he was alleged to have falsely presented, but he also demanded a bill of particulars so that he might be apprised of what he had to meet. the court overruling the demurrer and refusing to grant the bill of particulars. This was serious prejudicial error.

In forgery cases and cases involving documents it has generally been required by federal courts to set forth the forged instrument or give the defendant the substance of it.

In *American Jurisprudence*, Vol. 27, p. 621 *et seq.* on Indictments and Information, it is said:

> "It has been said that this constitutional right is based upon the presumption of innocence and that it requires such definiteness and certainty in the charge in an indictment or information as will enable a presumptively innocent man to prepare for trial . . ." (Sec. 57.)
>
> **"Written or Printed Matter and Pictures.—It is the general rule, in the absence of statute, that an instrument referred to in an indictment must be set forth according to its tenor with particularity and certainty, or the omission to do so excused by proper averments, such as that it has been lost or destroyed, or that it had remained in the possession of the accused; according to some authorities, an exact copy of the writing must be set forth in the indictment."**

Here the written instrument—the claim, was not set forth either in the indictment nor was the defendant given a bill of particulars.

The defendant in a criminal case is presumed to be innocent; that presumption clothes him throughout the trial of the case. Under that presumption the court upon looking at the face of the indictment is entitled to know whether it does or does not charge a crime, and, if, under the facts alleged, the accused could be innocent, no crime is charged. (*People v. Schmitz*, 7 Cal. App. 330; *People v. Davenport*, 21 Cal. App. (2d) 292.) *U. S. v. Johnson*, 53 Fed. Sup.

Under the particular charge in this indictment is must be presumed that the claims were regular and proper unless the indictment itself charges a fact which show them to be otherwise. The government was in possession of this information. The court and defendant were entitled to it.

In *Keys v. United States*, 126 Fed. (2d) 181, 184, the court said:

> "At common law an indictment for sending a threatening letter, or for forgery or libel, was required to be set out in *haec verba*. Bradlaugh v. The Queen, L. R. 32, B. D. 618; and the federal courts have in some instances followed or repeated the rule. United States v. Noelke, C. C. N. Y., 1 F. 426, 433; Wilson v. United States, 2 Cir. 275 F. 307, 312."

See, also:

Bartel v. United States, 227 U. S. 427, 57 L. Ed. 583.

As said in *Harris v. United States*, 104 Fed. (2d) 41, where an indictment fails to set out the essential elements of a statutory offense, it is the duty of the court to set aside the judgment.

In that case the defendant was charged with making certain false entries in records of the Postoffice establishment knowing the same to be false with intent to mislead and defraud the Postoffice establishment. The count of the indictment charged the defendant with making a false "Statement of Mailing." There is an absence of any allegation identifying said "Statement of Mailing." The court held that such an indictment was insufficient.

It is respectfully submitted that an allegation of a false claim is equally as indefinite as a "Statement of Mailing" where the claim is not otherwise sufficiently described to identify it.

In the *Harris* case the court reversed the judgment even though the sufficiency of the count was not formally challenged by demurrer or motion to quash but only upon a motion for a directed verdict.

> "Proper identification of the paper forged, or of the record of the Postoffice Establishment at Lebanon, is an essential element of the crime defined by Section 189. This has been omitted from count four. It cannot be supplied by 'intendment or implication,' and the defect was not cured by the guilty verdict.
>
> "The judgment of the lower court is accordingly reversed."

In the case of *Fuller v. United States,* 110 Fed. (2d) 815 (Ninth Circuit), it was alleged that a false affidavit was filed in connection with a claim against the United States. The affidavit in this case was set out in full.

Likewise in *U. S. v. Gilliland,* 35 Fed. Supp. 181, the affidavit was set out in full.

Where a claim is known to the Government it is certain that there is no reason why it should not be set out so that the defendant could know what it is he is charged with having done.

No case ever cried louder for this to be done than the present case.

In *Fuller v. United States,* 110 Fed. (2d) 817 (9th Cir.), it was said:

> "Appellants moved for a bill of particulars, but there was no error in the denial of the motion. The offenses charged are described with great particularity in the indictment. The precise facts alleged to have been falsified are set out in the indictment and the affidavits themselves are incorporated in the various counts."

This was not done here.

See:

United States v. Cruickshank, 92 U. S. 542, 23 L. Ed. 588;

United States v. Hess, 124 U. S. 483, 32 L. Ed. 516;

Blitz v. United States, 153 U. S. 308, 38 L. Ed. 725;

United States v. Carll, 105 U. S. 611, 26 L. Ed. 725;

Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419;

United States v. Dowling, 278 Fed. 630 (D. C., S. D. Fla.);

Brenner v. United States, 287 Fed. 636 (C. C. A. 2d Cir.);

United States v. Green, 136 Fed. 618-659 (D. C., N. D. N. Y.);

Conrad v. United States, 127 Fed. 798 (C. C. A. 5th Cir.);

Salla v. United States, 104 Fed. 544 (C. C. A. 9th Cir.);

United States v. Bopp, 230 Fed. 723.

In *Hills v. United States*, 97 Fed. (2d) 713, it was held:

> "The first paragraph of the count attempts to charge in the language of the statute, but states only that appellant wilfully falsified 'a material matter.' The words 'a material fact' are omitted. Obviously, it is the falsification and concealment of facts leading to the sale, and not of the whole of the 'matter' of the purchase under the statute, in which the government is engaged, which constitutes the offense."

The District Court Should Have Sustained the Demurrer to the Indictment Because the Indictment Failed to Set Out the Applicable Portion of the Contracts, and No Bill of Particulars Was Ordered to Set Out the Applicable Portions of the Contracts.

Had the trial court ordered the Government to either amend the indictment to allege the applicable portion of the contracts, or furnish a bill of particulars, then the provision regarding the flight test and insurance would have had to have been set up.

It may be said that the charge in the indictment gives a false statement to the court, counsel and jury, in that it implies that the contract required payment to McAvoy for the flight test alone, whereas under the provisions of the contract it was specified: "(A) Chief test pilot's fee and insurance, $4,000.00." [R. 305.]

The indictment represents that the contract did not make such a provision, and in that respect Count IV and Count V are misleading.

Pettibone v. United States, 148 U. S. 195, 37 L. Ed. 419.

Counts IV and V Are Insufficient Upon General Doctrine.

Both counts, IV and V, are insufficient in the particulars above mentioned, not only upon the hyoptheses set forth above, but under the equally fundamental and more often applied principles announced in such decisions as:

Armour P. Co. v. United States, 209 U. S. 58, 83, 52 L. Ed. 681;

Keck v. United States, 172 U. S. 434, 43 L. Ed. 505;

Rosen v. United States, 161 U. S. 29, 49 L. Ed. 606;

Cochran v. United States, 157 U. S. 286, 290;

Bacheldor v. United States, 156 U. S. 426;

Potter v. United States, 155 U. S. 438;

Evans v. United States, 153 U. S. 584, 588;

Pettibone v. United States, 148 U. S. 197;

United States v. Hess, 124 U. S. 483, 31 L. Ed. 516;

United States v. Britton, 107 U. S. 655, 662;

United States v. Carll, 105 U. S. 611, 26 L. Ed. 1115;

United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819;

Foster v. United States, 253 Fed. 481;

Knauer v. United States, 237 Fed. 8;

Peters v. United States, 127 Fed. 127;

Re Greene, 52 Fed. 104.

Of the above cases the following involve alleged violation of the National Banking Act, which contains provisions very similar to those of the instant Act and which were dealt with in these decisions:

Cochran v. United States, 157 U. S. 286, 290;
Evans v. United States, 153 U. S. 584, 588;
United States v. Britton, 107 U. S. 655, 662;
Peters v. United States, 94 Fed. 127.

D.

Count IV of the instant indictment contains no direct averment that the figure filled in upon the blank check signed by William H. McAvoy did not represent the compensation which had been paid to him or was due for his services (expenses and insurance) as a test pilot. The only allegation from which such an inference could be drawn is that wherein it is said:

> "Defendants Edward F. Zap and Lloyd Scott well knew that said McAvoy had been paid approximately $2,375, and no more, for conducting said test flights and that no other or further sums had been incurred for and on account of said test flight expenses."

The pivotal fact in this whole particular description of the facts and acts of the defendants which, if true, would establish that they did "falsely state and represent" to Hilton Byers that $4,000 had been paid to McAvoy, is that McAvoy had not been paid $4,000, as indicated by the rubber stamp indorsed cancelled check and that $4,000

was not due for the flight test (and insurance). Every fact directly alleged in this charge might be true and no offense would have been committed. The truth of this proposition is so plain that it is reasonable to suppose that the pleader had some reason for omitting to clearly and definitely aver that McAvoy had only been paid approximately $2,375, and that $4,000 had not been paid for flight test including McAvoy and expenses and insurance.

Had such an averment been made it would have then been proper, and perhaps necessary, to have added that the defendants then and there well knew that McAvoy had been paid $2,375, and no more, and also to aver that the contract only called for this amount and no more, this of course the pleader could not do.

E.

The indictment was also bad on account of duplicity. Count V charges two distinct defenses, and the jury might have been divided so that six believed one act and six another, and yet there was no unanimity on the subject as a whole. (*Blitz v. United States*, 153 U. S. 308, 38 L. Ed. 725; *United States v. Melsi*, 118 Fed. 903; *United States v. Hess*, 124 U. S. 483, 81 L. Ed. 516; *United States v. Simmons*, 96 U. S. 360, 24 L. Ed. 819; See particularly *United States v. Britton*, 107 U. S. 615; 27 L. Ed. 524; *United States v. Tello*, 6 Fed. (2d) 579; *Keck v. United States*, 172 U. S. 434, 437, 43 L. Ed. 505.)

Count V, was duplicitous because it charged two inconsistent things; concealment and making a false statement. One requires silence; the other expression.

It charges that the defendants covered up by trick, scheme and device a material fact, and it also charges that they did make and cause to be made a false and fraudulent statement and representation, etc. Each is a separate offense under the Act. (*Ex parte Shaffenourg*, 21 Fed. Case 12696.)

Under this duplicity part of the jury might have believed that appellant concealed and made no false statement and representation, and part might have believed he made a false representation but did not conceal. Therefore the demurrer on the ground of duplicity should have been sustained.

United States v. Morrison, 16 Fed. Supp. 934.

In the case of *People v. Werner*, 29 Cal. App. (2d) 126, the court held a conviction void where the intent was inconsistent.

Here, the allegations of the indictment are inconsistent, so that a juror might in one instance believe that the defendant concealed and in the other instance that he made a false and fraudulent statement. Hence six of the jurors might believe one thing and six another. An indictment which permits such a situation is duplicitous. (See *United States v. Morrison*, 16 Fed. Supp. 934; *Waters-Pierce Oil Co.*, 212 U. S. 86.)

IV.

The District Court Erred in Denying a Bill of Particulars. [Assignment of Errors 8, R. 756.]

The record consists of more than 770 pages. There were fifty-eight government exhibits, some consisting of many pages, introduced against the defendant. Several of these are of such nature that they might come within the description of a claim.

The appellant, therefore, stands in this unique position: That being jointly accused with Lieutenant Scott, he did not know until the prosecution rested, what acts were alleged to have been committed by him and what acts were claimed to have been committed by his co-defendant. There having been a long series of transactions between appellant and the government, extending over a period of years and arising under several different contracts out of each transaction, one or more claims each embracing several items having been presented to some officer, not always the same, it must be apparent that his situation so far as preparing his defense was concerned, was no different from what it would have been if this first count of the indictment had consisted of a single sentence alleging that he and his co-defendant had presented a false claim to an officer of the government within the period of limitations.

The defendant demanded a Bill of Particulars in which he demanded the exact and specific terms of the alleged false claim, the exact terms of the contracts, the details of the claim under contract 83142 and information as to what part is claimed to be false, and to whom the claims

were allegedly presented and their exact authority. He also demanded to know the exact false representation alleged and the respect in which the same is claimed to be false. His motion for a bill of particulars was denied.

The defendant was entitled to a bill of particulars for the many uncertainties and to give him the necessary information to prepare his defense.

The need for a bill of particulars is clearly shown by the manner in which the allegations were set forth in each count of the indictment.

Here, appellant was in the dark not only at the beginning of the case, but throughout the case, as to what the Government was referring to as a false bill, voucher, claim, certificate or affidavit. So was the jury necessarily at the close of the case. This shows the tremendous need for a bill of particulars in this case.

In Count IV again a false claim is alleged, but without setting out the claim.

In Count V it is again alleged that the defendants "did falsify, conceal and cover up by trick, scheme, and device, a material fact and make and cause to be made a false and fraudulent statement and representation in a matter within the jurisdiction of a department or agency of the United States . . . ." Again there is no showing as to what the fact was or what the representation and statement was, or wherein it was alleged to be false, or to whom it was presented.

A Bill of Particulars is the appropriate remedy where the indictment is general or indefinite.

Rosen v. U. S., 161 U. S. 29, 40;
Glasser v. U. S., 315 U. S. 60, 86 L. Ed. 680;
Baker v. U. S., 115 Fed. (2d) 533, 85 L. Ed. 1128;
U. S. v. Grossman, 55 Fed. (2d) 408;
Kager v. U. S., 46 Fed. (2d) 302;
Beck v. U. S., 33 Fed. (2d) 107.

Or where the indictment does not give accused sufficient knowledge to enable him to prepare for trial.

Braylon v. U. S., 74 Fed. (2d) 389-390;
Vedin v. U. S., 257 Fed. 550;
Morris v. U. S., 161 Fed. 672;
Rinker v. U. S., 151 Fed. 755, 759;

See also *Rimmerman v. U. S.*, 186 Fed. 307.

Also a Bill of Particulars should be granted where the language is such that the defendant is likely to be surprised. (*Singer v. U. S.*, 58 Fed. (2d) 74; *O'Neill v. U. S.*, 19 Fed. (2d) 322.)

Clearly the allegation that the expenses purported to be for conducting certain tests under the terms and provisions of said contracts, involves conclusions whether certain tests were or were not, *under the terms and provisions of said contracts*, might easily depend upon the interpretation given the contracts under consideration.

We think that the appellant was entitled to know definitely whether the government contended that he presented the claim or that it was presented by Scott in his behalf.

V.

The District Court Erred in Overruling the Plea in Abatement and the Obection to the Jury Being Composed Entirely of Men. [Assignment of Errors 9, R. 756.]

Title 28, section 411, United States Codes, provides:

> "Jurors to serve in the courts of the United States, in each State respectively, shall have the same qualifications, subject to the provisions hereinafter contained, and be entitled to the same exemptions, as jurors of the highest court of law in such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned."

This section applies to the mode of obtaining the general panel of jurors, as well as to the method of impaneling them in a specific case on trial. (*Silsby v. Foote*, 14 How. (55 U. S., 219, 14 L. Ed. 395); *United States v. Collins*, Fed. Case. 14837; *Brewer v. Jacobs*, 22 Fed. 217; *Glasser v. United States*, 315 U. S. 60, 86 L. Ed. 680.)

Section 412 of Title 28 provides:

> "All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, *possessing the qualifications prescribed in the section last preceding*, which names shall have been placed therein by the clerk of such court . . ."
> (Italics ours.)

The record in this case shows that women were excluded from both the grand and petit juries and had been for several years preceding this case. Since this case

the method of selecting juries in Los Angeles County has changed, and both men and women are now on the panel of the grand and petit juries.

It need hardly be argued that women who are qualified to be Waves, Wacs, Spars and Marines, are qualified to be on juries, and their exclusion, to which objection was made in this case should have been sustained.

Glasser v. U. S., 86 L. Ed. 680.

VI.

The District Court Erred in Refusing to Order the Return to the Defendant of the Papers and Documents Which Commander Smith Had in His Custody so That He Could Prepare His Defense. [Assignment of Errors 19, R. 758.]

These papers were in the possession of the government, and Commander Smith expressed his willingness to return them to the defendant "upon the order of the court." Commander Smith was in court and offered to return these papers "upon orders of the court." The government counsel, not the Navy, resisted the demand. Upon this resistance Judge Yankwich held he was "without jurisdiction." It was only after the trial started, and the trial judge ordered the production of the papers that they were then produced. Application was duly made to the court but Judge Yankwich held that he had no jurisdiction in the matter, to which an exception was made [R. 32]. This was error and deprived the defendant of his right to get at the material papers necessary for his defense.

> "Certain safeguards are essential to criminal justice. The accused must have ample opportunity to meet the case of the prosecution. Adams v. U. S., 87 L. Ed. 212."

VII.

The District Court Erred in Its Procedure Relative to the Discharge of Juror No. 2, and in Holding the Hearing Outside of the Hearing of the Defendant and in Excusing Said Juror Without the Defendant's Consent. [Assignment of Errors 21, R. 758.]

After the jury had been impaneled the government moved to discharge juror No. 2, a Mr. Wiget, because it appeared that when he left the jury room he was observed by Murray Myerson, an F.B.I. agent, speaking to the defendant Scott in the hallway immediately outside the court room. According to Myerson, the juror approached Scott, put out his hand, and referred to a conversation he had with Scott about the sinking of some boat [R. 260-265].

A discussion, together with the testimony of the F.B.I. agent, was had at the bench outside of the presence of the defendants, and outside of their hearing. Counsel for this appellant at first objected to excusing the juror, but counsel for Scott agreed to excuse him, and counsel for appellant stipulated that the juror could be excused. This, however, was outside the hearing of the defendants and without their knowledge.

Thereafter the manner of excusing the juror was left entirely to the judge, who simply excused the juror as soon as counsel returned to their seats at the counsel table.

At no time did the defendant Zap know what had transpired at the bench.

While defendant Zap's counsel did agree to have the said juror excused and stipulated to the same, he feels

duty bound to present to this court for determination, the same as though some other counsel had taken over the appeal, (1) whether the court acted properly when it excused the juror without first asking and obtaining the express consent of the defendant Zap, and (2) whether the proceedings had at the bench outside the presence or hearing of Mr. Zap, and without his full knowledge—which matters arose unexpectedly while counsel were at the bench regarding other matters—deprived the defendant Zap of his fundamental right to be actually present at every stage of the proceedings and to actually hear everything that occurred especially in so important a matter as excusing a juror and selecting another one. It is respectfully submitted that both court and counsel erred in the proceedings had, unless counsel had the right to bind his client to the discharge of a juror after proceedings outside of his hearing and without his knowledge.

Under the authority of the cases of *Lewis v. United States*, 146 U. S. 370, 36 L. Ed. 1011, and *Patton v. United States*, 281 U. S. 276, 74 L. Ed. 855, the defendant Zap was not only entitled to hear everything that occurred with reference to the selection and discharge of a juror, but before a juror who had already been selected and passed could be discharged his express consent should have been secured.

The jurors had all been accepted by both sides after such examination as satisfied counsel of their impartiality. If any juror answered in response to any questions that he was unacquainted with both defendants and after-

wards thought he was acquainted with one, that juror was entitled to the presumption that he had innocently mistaken the fact as to his acquaintance. If any juror who had thus been accepted afterwards came to be under suspicion the defendant had a right to be personally apprised of that fact and to have those witnesses cross-examined by his counsel *after the communication to such counsel of all the knowledge concerning the matter which the defendant possessed.*

In *Lewis v. United States, supra,* the Supreme Court said:

> "A leading principle that pervades the entire law of criminal procedure is that after indictment found nothing should be done in the absence of the prisoner. While this rule has, at times, and in the cases of misdemeanors, been somewhat relaxed, yet in felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial."

The court in that case cites numerous cases sustaining the proposition that the accused must be so present and that the record must affirmatively show his presence, including *Hopt v. Utah,* 110 U. S. 578, 28 L. Ed. 264, where it was said:

> "For every purpose, therefore, involved in the requirement that the defendant shall be personally present at the trial, where the indictment is for a felony, the trial commences at least from the time when the work of impaneling the jury begins."

And:

"We are of the opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view, as well as to the relations which the accused owes to the people as to the end of human punishment. . . . The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods."

This case was approved in *Territory v. Day,* 2 Okl. 411, 37 Pac. 806; *State v. Mannion,* 19 Utah 511, 75 Am. St. Rep. 756, 57 Pac. 543, 45 L. R. A. 639.

Was the defendant "present" personally within the meaning of the above cases when the proceedings took place at the bench outside the hearing of the defendant and he did not know what was taking place or what had taken place any more than if he had been in New York or Washington. The discharge of Juror No. 2, Mr. Wiget, was erroneous without the full knowledge and express consent of Zap.

D. A. Form No. 71
Form approved by Comptroller General, U.S.
May 7, 1942

265.4
16-m

D. O. Voucher No. 36062
☒ Preliminary No. 40
☐ Monthly bill No.
(Mark X for kind of payment)

PUBLIC VOUCHER FOR COST PLUS CONTRACTS

11th Naval District
San Diego, California October 18 1942
(Place) (Date)

PAID BY
11th NAVAL DISTRICT
SAN DIEGO, CALIFORNIA
JAMES A. [illegible]
[illegible]

Appropriation 1711502.4 Aviation, Navy, 1941 (VI)
Title and account 15XB-(170) Property Accounting Office-Bu.S&A.
The United States, Dr. To Edward P. Zap
10976 Wilshire Blvd., Los Angeles, California

Contract No NOa 83142 Dated 22 March 1941 Requisition No. 1049 Date
For Work on a Cost-Plus-A-Fixed-Fee basis under contract.

Period			
	Labor		
	Material		
	Indirect charges		
October 1942	Other Direct Charges	4,300 00	
	Subtotal		4,300 00
	Fixed charges on labor		
	Manufacturing		
	Fixed profit		
	Other charges		
	Total		4,300 00
	Less [illegible]		
	Performance and [illegible]		
	Net amount		4,300 00

I hereby certify and solemnly swear that the above bill is correct and just and that payment therefor has not been received.

October 15 1942

Edward P. Zap

By Edward P. Zap
Title Individual Prop.

I hereby certify that the foregoing is the actual cost, and that the services have been performed or materials delivered, in accordance with the contract.

October 15 1942

G. A. Smith
Constr. (Insp.) Naval Aircraft

L. S. Sinof, Ensign (SC) USNR
(Inspector)

(NOT REQUIRED ON PRELIMINARY BILLS)

Navy Department, Washington, D. C., 19

We certify that the above services were performed or materials delivered as stated herein; that they were procured under the contract considered above; that they were necessary for the public service; and that the prices charged are just and reasonable and in accordance with the agreement.

Approved for $

Chief, Bureau of
Chief, Bureau of
Secretary of the Navy

GENERAL ACCOUNTING OFFICE
Comptroller General of the United States

Credited for payment in the sum of $

By

Paid by Check No. 185143, dated 19, on Treasurer of the United States, in favor of payee named above.

Current Voucher	Previously Vouchered	Total
$ 4,300.00	$ 367,449.87	$ 371,749.87

Edward F. Zap
Individual Proprietor

Edward F. Zap
Individual Prop.

VIII.

The Trial Court Erred in Failing to Direct the Verdict in This Case. [Assignment of Error 26.]

The charge in this case as to Count 4 is as follows:

> "On or about the 16th day of October, 1942, defendants Edward F. Zap and Lloyd Scott did make and present *a claim* for $4,000 upon the United States Navy for payment by presenting same to the Disbursing Officer, Bureau of Supplies and Accounts, United States Navy, San Diego, California. That said claim falsely purported to be *for expenses* incurred by said defendants in paying William H. McAvoy for services *falsely therein set forth* to have been rendered by said McAvoy as a test pilot of aeronautical equipment pursuant to the aforementioned contract 83142. That said claim was false in that the sum of money actually paid to said William H. McAvoy for said services was $2,375, and no more, and not $4,000, as therein set forth."

The claim is shown below photostated.

It was made by the Navy inspectors and presented to Zap for signature under the present wartime setup [R. 291].

We respectfully submit there is nothing on the claim that falsely or otherwise purports to be:

1. For *expenses* incurred by said *defendants*, in paying William H. McAvoy for services.

2. Falsely *set forth therein* to have been rendered by said McAvoy as a test pilot.

If there is anything on this claim which shows that it is for expenses incurred by William H. McAvoy, or solely for services rendered by William H. McAvoy, or that it is for services rendered by him as a test pilot with all additional expenses incident thereto, we fail to find it. If there is anything showing a claim for $4,000 upon the United States Navy, we have failed to find it. If there is anything to show that any claim was presented solely for expenses for McAvoy (as distinguished for flight test and all expenses) in the sum of $4,000, we have failed to find it.*

We respectfully submit that upon this ground alone the defendant was and is entitled to a directed verdict.*

As to Count 5 it is alleged that the defendants Zap and Scott did falsify and conceal and did cover up by trick,

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*The flight test fees, which this claim covered, included many things, airport hangars and hangar space, fuel and oil, the pilot's fees, all of his expenses to and from his home, all living expenses while away from home, insurance of various characters, consultation trips. [R. 305, 591.]

scheme, and device, a material fact and make and cause to be made a false statement as follows:

"On or about the 23rd day of September, 1942, defendants Edward F. Zap and Lloyd Scott did falsely *state* and *represent* to *Hilton Byers*, who was then and there the United States Navy Cost Inspector, that the sum of $4,000 had been paid to William H.

•McAvoy testified [R. 305]:

"I was insured at all times during this flight. If I may refer back to a previous job with Mr. Zap the year before I carried that insurance myself, and paid for it. This particular time, it amounted to considerably more, and Mr. Zap kindly said that he would take care of it.

All of the tests were originally planned to be run at Hughes Field, if that is the place you are speaking of, and due to the weather we could not proceed and we had to change our location. We started the flight tests at Hughes Field, and included in my arrangements with Mr. Zap, and as a customary procedure, I was to be paid my traveling expenses down here. And Mr. Zap took care of those, that is right. I was also to be paid my expenses back—all additional expenses involved. [80]

"My home is in Los Altos, and my place of business at Moffett Field. I came by airplane. I think in every instance that I came down I flew down, and flew back. And in addition to my expenses for the trip, the pilot's fees also include all living expenses while here. Mr. Zap took care of all those. That was over and above the $2,000 which I originally planned on—originally stated in my contract with him. That was not included in any check that I received. In other words, Mr. Zap paid those additionally to anything that I received myself. No itemized statement that I know of has ever been made on that, as far as I am concerned, but they were all taken care of.

"After I flew at Hughes Field a heavy fog came up and the conditions here were quite foggy, and so I had to go to Daggett, which is about a hundred miles away. It is at least [8] that, if not further than that. I went up there and all my expenses up there were taken care of. In addition to my expenses up there, my expenses going to Daggett were taken car of."

Champlin estimated insurance costs "round three or four thousand. It might have been two." [R. 487.]

McAvoy for acting as test pilot in conducting certain tests pursuant to said contract 83142 *and did present to said Cost Inspector in support of said false statement and representation a cancelled check for $4,000 endorsed by said William H. McAvoy.* The defendants had previously presented to said McAvoy a check in blank and requested said McAvoy to endorse the same. That said McAvoy did so endorse the same."

Nowhere in the record is there any evidence that the defendants, or either of them, falsely *stated*, or ever *stated* or *represented to Milton Byers* that the sum of *$4,000* had been paid to McAvoy for acting as a test pilot. Byers did not so testify. The gravamen of the charge of count V is that the check was presented to Byers. Nowhere in the record is there any evidence that a cancelled check for $4,000 endorsed by William H. McAvoy was ever presented to the said *Cost Inspector* (Byers), in support of said *false statement*.* Byers did not so testify. If there is any such evidence in the record we have failed to find it anywhere in the testimony of Hilton Byers who would be the person who would have to testify to that fact.

Zap never made any representations to Byers. The amount filled out on the check was filled out by Ethel

*The check, a personal check on Zap's personal account, was typed in on October 13, 1943, and endorsed with a rubber stamp and taken down to the bank by Ethel Boyle, bookkeeper, Oct. 13, 1943. Its perforation shows it was paid that date. If it be presumed that it remained at the bank until the end of the month of October Zap was in the East from October 18 to Nov. 5, 1943. There is nothing in the record that shows the check was seen by Byers or presented to any cost inspector, as alleged in the indictment. Byers does not state it was presented to him. Zap did not know the amount on the check. Did not direct the amount put in, did not endorse it. Did not show it to anyone.

Boyle without any knowledge of Zap and the books which were made up were kept by certified auditor Browne and Champlin [R. 535] without any knowledge on the part of Zap. Zap testified he never knew anything about the books, and Ethel Boyle and Champlin so confirmed this testimony. [R. 534, 657.]

It is respectfully submitted that for each of these reasons failure of proof of fact as alleged in the indictment an indictment must be proved substantially as laid.

United States v. Corlin, 44 Fed. Sup. 940.

B.

The verdict should have been directed because of variance between the pleadings and the proof. Specification of error IV. [Assignment of Error No. 27—R. 759.]

The only claim which the Government sought to prove here was a claim for $4,300. We moved for a directed verdict on the ground that the indictment charges an item of $4,000 whereas the claim is for $4,300. Also on the ground that the item as far as McAvoy is concerned varied from the terms and facts alleged in the indictment. [H. 719.]

There is no claim for $4,000. A claim for $4,300 is surely not one for $4,000. We think that the motion to direct the verdict on this ground alone also should have been granted.

C.

The court erred in failing to direct the verdict on the grounds of lack of any guilty knowledge on the part of Zap, an essential ingredient of the statute and charged in

the indictment. In this respect the case is very similar to *U. S. v. Kelley* (9th Cir.), 138 Fed. (2d) 823, wherein fraud was charged in an application for veteran's insurance. In that case the learned court said:

> "The answer to question 40 was not made by Kelley, but was made by Doctor Lenger."

In our case the check, Exhibit 7, a personal check on Zap's personal account which was introduced by the Government, was not filled out by Zap but by Ethel Boyle on directions of the certified public accountant Browne, without Zap's knowledge.*

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*Ethel Boyle testified as follows [R. 467-469]:

"*Cross-Examination*

By Mr. Lavine:

I stated that this check for $4,000 was made out—that the typewritten part of it was typed by me, that is, I typed in 'Pay Four Thousand Dollars, $4,000, to the order of [221]—that is my typing, 'William H. McAvoy.' And I typed in 'Four Thousand Dollars.' I typed in the entire check. At the time that the check was handed to me to the typing in, Mr Zap's written signature was on the check. I said that I got instructions from Mr. Browne as to how to fill in the check. Mr. Browne furnished me with a typewritten statement as to how the items of charges were to be made. I see here [221-a] Defendants' Exhibit W, a work sheet, written by Mr Browne. I know Mr. Browne's handwriting. A typewritten sheet of a similar character was furnished to me at the place of business. That typewritten sheet had '3-15, flight test,' and had over it 'Contract 83142, fixed fee basis.'

Now, at the time that the check was handed to me by Mr Browne, I don't recall that Mr. Zap was present. I don't think so. Mr. Zap was in and out. In fact, I had so little to do with Mr. Zap—all my instructions came from Mr. Browne and Mr. Champlin. I really don't recall Mr Zap being around at the time. I do know I went to Mr. Browne. I gave the blank check at first, and I had 'September 23, 1941,' typed on the blank check, as well as my '3-15' down in the voucher part. Then when this check was given to me to fill out I asked Mr Browne how much I should make it out for, and, well, I was told to make it out to McAvoy and how much I should put in.

The *Kelley* case further says:

> "It was not signed by Kelley, nor so far as the record shows was it based on information obtained from Kelley."

In the present case the check, while signed in blank by Zap, was not endorsed by Zap after it was signed but was endorsed by a rubber stamp and was based on information obtained from the certified public accountant, Thomas Cedric Browne.

The *Kelley* case further says:

> "There was no evidence that Kelley saw it or knew anything about it."

In the present case there is no evidence that Zap saw the check after it was filled in for the $4.000 amount, or knew anything about it.

And it was endorsed and the signature was on, as I recall it. But where Mr. Zap was I don't know. That is, it was endorsed on the back by Mr. McAvoy, and Mr. Zap's signature was on the face of the check; but that wasn't anything irregular. Quite often Mr. Zap left signed checks for me so I had my signed checks of Mr. Zap when he was away. Mr. Browne would tell me to whom they were made payable. He would always give me all these bills and I'd use my signed checks for the payment of these bills. My instruction from Mr. Browne was to follow his memorandum on this contract 83142. [222] And in preparing this check I followed that memorandum, and Mr. Browne's instructions to me. This rubber stamp on the back of the check, that was stamped by me. Mr. Zap didn't endorse this check on the back after I filled it out. I took this check to the bank. I made a deposit and went over specially with that check. To my knowledge, I don't think Mr. Zap ever did see it after I filled it out."

IX.

The Exoneration of Defendant Scott Entitled Zap to a Directed Verdict Also.

The entire case of the Government was tried on the theory of joint operation, or that the defendants were co-conspirators. The indictment charged the defendants jointly with each of the acts alleged. The evidence was presented on such a joint theory. Therefore, when the Government proceeded on this theory, and the court directed a verdict in favor of Scott, it should likewise have directed the verdict in favor of Zap.

The court in instructing the jury said:

> "The second paragraph deals with the defendant Lieutenant Commander Lloyd Scott. It is not necessary to read that because the court has dismissed Lieutenant Commander Scott: if I, in any part of the indictment, should read defendants, you will remember that it only applies to one."

Appellant argued to the trial court as follows:

> "In connection with this matter, your Honor, when this case started out it started out on the theory of a conspiracy between Scott and Zap. The Government's whole case proceeded under that evidentiary theory. The indictment alleged both of them jointly, and in connection with that matter the Government charged them 'Lloyd Scott and Edward F. Zap' and then proceeded under this evidentiary conspiracy theory. The evidence was presented through Champlin as to certain supposed conspiracy acts. Each of the counts was infected by that situation. We reached a point in the trial, your Honor, where there was, in fact, no proof as to Scott, and the Court then

dismissed Scott and determined to direct the verdict as to Scott.

"Now, what position did that leave Mr. Zap in, legally, as well as factually, your Honor? Legally it left him in the position of having been acquitted of a conspiracy as far as Scott is concerned, and in so far as the Government having proceeded on the theory of conspiracy in the entire case it left us in the position where we could not do anything else but leave it alone. The jury had all that evidence before it. . . . and I think the acquittal of one of the co-defendants under the circumstances entitled the other to the acquittal also on all of the counts.

"Where there are two co-defendants and they are tried on an evidentiary theory of conspiracy in the entire case, and two defendants only, as here, then if one of the defendants is discharged it entitles the other one to a discharge." [R. 733-735.]

It is well known that when only two persons are charged with a conspiracy the acquittal of one acquits the other. In civil law, where there are two joint tort feasors the release of one releases the other under the principle of retraxit. Here it was the contention of the Government that both men operated jointly. Perhaps the Government started out on this theory in the hope of prosecuting and convicting Scott, as well as Zap. Scott was shown to be innocent and there was no evidence that he did this, and that, and the other thing, as charged in the indictment, the verdict was directed in his favor. It is respectfully submitted that Zap, equally with Scott, was entitled to a directed verdict.

X.

The Court Erred in Altering the Indictment by His Instructions!

The indictment charged in Count I "that on or about the 23rd day of September, 1942, the defendants Edward Zap AND Lloyd Scott did present to the Disbursing Officer, Bureau of Supplies and Accounts," etc.

In Count IV the charging part of the indictment sets forth "that on or about the 16th day of October, 1942, at Los Angeles, California, and at other places, to the Grand Jurors unknown, within the jurisdiction of this Court and within the Southern District of California, Central Division, defendants Edward F. Zap *and Lloyd Scott* did unlawfully, . . . make and present, etc., charging Zap and Scott jointly throughout.

In Count V, paragraph 22, it is charged "that on or about the 23rd day of September, 1942, defendants Edward F. Zap *and Lloyd Scott* did falsely state and represent," etc.

The court erred in instructing the jury to disregard that portion of the indictment relating to the defendant Scott.

The court in charging the jury said:

> "The second paragraph deals with the defendant Lieutenant Commander Lloyd Scott. It is not necessary to read that because the Court has dismissed Lieutenant Commander Scott; and if I in any part of the indictment should read 'Defendants,' you will remember that it only applies to one." [R. 669.]

On page 670 of the record the court said to the jury:

> "I will read it as it is written and then you will omit the defendant Scott."

The instructions of the court altered the indictment in violation of the constitutional provisions relating to the return of indictments as construed in *Ex parte Bain*, 120 U. S. 1, and *Edgerton v. U. S.*, 143 Fed. (2d) 697.

In the case at bar the defendants were both charged jointly. The evidence was presented on that theory throughout the case. The trial court told the jury to ignore the reference to Lloyd Scott. It is true that the court had directed the verdict as far as Scott was concerned, but this gave the court no authority to omit a phrase in the indictment. By doing so it was in effect trying the defendant on a charge not found by the grand jury, which is contrary to the principles enunciated in *Edgerton v. United States*, 143 Fed. (2d) 697. The withdrawal of the words "and Lloyd Scott" against Zap, and was, as in the *Edgerton* case (143 Fed. (2d) 697), a stressing of the charge against Zap. That the subject-matter was very confusing to the jury is shown by the fact that the jury itself asked for a copy of the indictment [R. 720] and also a copy of the instructions of the judge [R. 720]. Neither was furnished to the jury although Count I was reread to the jury and the jurors were promised that the instructions would be typewritten and sent to them.

Even though the court directed the verdict as to Scott, it could not remove Scott's name from the indictment returned by the Grand Jury, by an instruction, which told the trial jury that the indictment did not mean what it said, namely "Edward F. Zap and Lloyd Scott," etc.

XI.

The Court Below Failed to Instruct the Jury on the Statute and Law Applicable to the Case and the Decision of This Court Is Therefore Implicitly in Conflict With the Case of Corson v. U. S., 147 Fed. (2d) 439, and With Screws v. U. S. (1945), 89 L. Ed. 1029.

The trial court below gave no specific instructions to the jury on the statute which the accused was alleged to have violated as to Counts 4 and 5.

There was no assignment of error, or specification of error as to the failure of the trial court to give instructions on the statute involved. There were assignments of error made as to the refusal to give certain instructions relating to the definition and explanation of a claim within the meaning of the statute.

The case of *Corson v. U. S.*, 147 Fed. (2d) 439, holds that the failure to give such instructions is reversible error. The United States Supreme Court has decided the case of *Screws v. United States*, L. Ed. Adv. Opinions, Vol. 89, p. 1029.

The court held in the *Screws* case that where the instruction related directly to the case under dispute and was necessary for the determination of the only issue involved that even without an assignment of error it was necessary in the interest of justice and fairness to reverse the case. The court said:

> "It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. See Johnson v. United States, 318 U. S. 189, 200, 87 L. ed. 704, 714, 63 S. Ct. 549. But there are exceptions to that

rule. United States v. Atkinson, 297 U. S. 157, 160, 80 L. ed. 555, 557, 56 S. Ct. 391; Clyatt v. United States, 197 U. S. 207, 221, 222, 49 L. ed. 726, 731, 732, 25 S. Ct. 429. **And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilty, those charged with a Federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."** (Blackface ours.)

Screws v. United States L. Ed. Adv. Opinions, Vol. 89, p. 1029, at 1039.

In the *Zap* case no instructions were given on the statute involved.

The court in *U. S. v. Bittinger*, 24 Fed. Cases, 1150 (Case No. 14,599), said in charging the jury:

"The indictment charges the defendant with having made false claims against the United States, knowing them to be false, fictitious, and fraudulent. Section 5438 of the United States statutes, under which the indictment is drawn, provides: 'Every person who makes or causes to be made or presents or causes to be presented for payment or approval . . . any claim upon or against the government of the United States, or any department thereof, knowing such claim to be false, fictitious or fraudulent, shall be imprisoned,' etc. By making a claim, as defined in this statute, is meant the asking or demanding on part of the defendant of the government payment for services. The term 'false,' used, means 'unfounded' or 'unjust'; by 'fictitious' is meant 'not

real'; by 'fraudulent,' wrong or 'deceitful.' These terms have no special legal signification in their use in this statute, but are to be taken by you in their ordinary and well-understood sense. The language of the statute and indictment, is, 'knowing such claim to be false, fictitious and fraudulent.' By the word 'knowing,' as here used, is meant the having a certain and clear perception of the falsity of the claim made. The object of the statute is to prohibit and punish the drawing of money from the treasury of the United States without having rendered legal and recognized equivalent."

In connection with the matter of the instructions the jury necessarily was confused as to what constituted a claim and could very easily have mistaken the certificate on page 5 of Exhibit 19 as a claim. Actually page 5 of Exhibit 19 could not be a claim, yet the jury without definition of what did or did not constitute a claim could very easily have misunderstood the meaning and purport of the statute since the jury had no instructions.

In *People v. Hecker*, 109 Cal. 451, the court said:

"The absence of instructions upon these questions of law left the jury without rudder or compass. The true rule for measuring the acts of the parties not having been given them, each was at liberty to set up his own independent standard and approve or condemn in accordance with it."

In *People v. Putman*, 20 Cal. (2d) 890, the court said:

"It is encumbent upon a court in a criminal case to instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case. (People v. Warren, 16 Cal. (2d) 103,

104 Pac. (2d) 1024; People v. Scofield, 203 Cal. 703, 265 Pac. 914; People v. Nudo, 38 Cal. App. (2d) 381, 101 P. (2d) 162; People v. Curren, 24 Cal. App. (2d) 673, 75 Pac. (2d) 1090; People v. Best, 13 Cal. App. (2d) 606, 57 P. (2d) 168.

"An instruction is necessary if it is vital to a proper consideration of the evidence by the jury. (People v. Warren, *supra*, People v. Tapia, 131 Cal. 647, 63 Pac. 1001; People v. Heddens, 12 Cal. App. (2d) 245, 55 P. (2d) 230.")

In *Bridgeman v. U. S.*, 140 Fed. 577, 592 (C. C. A. Ninth Circuit, 1905), the trial court gave a very full instruction, quoting the statute to the jury.[1] In the present case no such instruction was given and we respectfully submit that this court should reverse the case for this reason alone.[2]

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[1]In the *Bridgeman* case the court gave the following instruction:

"The statute of the United States under which the defendant is indicted reads as follows: 'Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, . . . every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand, nor more than five thousand dollars.' (U. S. Comp. St. 1901, p. 3674.)"

Bridgeman v. U. S., 140 Fed. 577, 592.

[2]It will be noted that in the subsequent case of *U. S. v. Chaplin* the same trial judge gave the statutory definition. 54 F. S. 682.

It will be seen by an examination of the record in this case that after the jury retired the jury was confused. The trial court had, instead of giving instructions on the statute involved, merely read the counts of the indictment to the jury. [R. 668.] The court after reading the indictment and telling the jury to omit the defendant Scott and not to consider him, even though his name was mentioned in the indictment, then proceeded to give the jury general instructions on their duties as jurors. But nowhere did the court define for the jury the statute that was applicable to Counts 4 and 5 or explain the meaning of the words in the statute. After the jury had retired and had been out slightly more than an hour, it sent a message to the court that it would like to get a copy of the indictment and the instructions of the judge to the jury. [R. 720.] A discussion followed in which defense counsel took exception to sending the indictment to the jury room but asked that the instructions be written up and sent. No instructions were ever sent to the jury room. The point we make is, the jury showed almost at the outset its confusion over the indictment and over the instructions. It was, of course, confusing since the jury was never instructed on the statute which the defendant was being tried and did not know the meaning of the words in the statute.

XII.

A.

The provisions of Section 80 make certain acts a violation of the statute. The trial court read the Indictment, but not the statute, and nowhere in the general charge is the statute given to the jury, nor is there a definition of the offense. We think this omission by the trial court is fatal error in this case, for without it the jury had no mark or measure to guide it in determining whether the defendant had violated the law.

Screws v. United States, 89 L. Ed. 1029.

The case of *Corson v. U. S.*, 147 Fed. (2d) 439, holds that the failure to give such instructions is reversible error. This court has decided the case of *Screws v. U. S.*, 89 L. Ed. 1029.

B.

The District Court Erred in Instructions Given and Refused.

1. The District Court erred in giving the following instruction:

> "You are instructed that the word 'willful' is used in the statute in this case and means a thing done without ground for believing it to be lawful, or *conduct marked by careless disregard as to whether or not the thing done is lawful.*"

Appellant objected vigorously to the instruction. He pointed out:

> "Careless disregard of truth, even in a perjury case, is not such an element as to make the offense wilful." [R. 710.]

The court overruled the objection, to which an exception was taken.

The court based its ruling on *United States v. Murdock*, 290 U. S. 289. That case, however, holds that the definition of the word "Willful" must be in relation to the particular type of offense alleged, and said:

> "Aid in arriving at the meaning of the word 'willfully' may be afforded by the context in which it is used (United States v. Sioux City Stock Yards Co. (C. C.), 162 Fed. 556, 562), and we think in the present instance the other omissions which the statute denounces in the same sentence only if willful, aid in ascertaining the meaning as respects the offense here charged."

Examined in the light of the statute which uses the word knowingly along with wilful the meaning of the word "wilful" as applied in section 80 we think is well expressed, that it denotes an act which is intentional, as distinguished from accident, but when used in a criminal statute it generally means an act done with a bad purpose.

There are cases where careless disregard would make a person liable, such as, for instance, in negligent homicide, or a case involving gross neglect of children, etc. However, under Title 18, section 80, the law is clear that a specific intent to do the act knowingly and wilfully and not a "careless disregard" of filing a false claim constitutes the gravamen of the offense. The instruction is therefore contrary to the statute.

Under the instruction of the court the jury could very properly convict the appellant for carelessness in the acts of his employees, or for failing personally to check items of account. The statute was not designed to punish such

acts, but to punish the deliberate "knowing and wilful" filing of a false claim with evil intent and purpose as a positive act, or the wilful making of a false statement as a positive act, or a wilful trick, scheme or device as a positive act.

In perjury cases which involve falsity of a statement to a court the law has been stated in *People v. Von Tiedeman*, 120 Cal. 137, quoting from Bishop's New Criminal Law, section 1048, as follows:

> "'Perjury cannot be willful where the oath is according to the belief and conviction of the witness as to its truth; reckless disregard of truth by a witness who has no belief that he is swearing falsely is not perjury, though his testimony is in fact false, and he would have made it true if he had used caution.'"

But guilty knowledge is made a specific part of Title 18, section 80, and the instruction flies in the face of that section.

This section not only requires allegation of knowledge and wilfulness, but proof thereof.

But "conduct marked by careless disregard as to whether the thing done is lawful" is lack of knowledge through carelessness as against the clear requirements of the statute that one is only guilty who makes or presents a claim "knowing such claim to be *false, fictitious or fraudulent*," or who shall "*knowingly and wilfully*" make or cause to be made a false or fraudulent statement or representation, etc.

This Court has fully discussed the meaning of the word "willful" in the recent case of *Screws v. U. S.*, 89 L. Ed. 1029. As applied to the present case and the

present statute, it is respectfully submitted that the trial court erred in instructing the jury.

2. The court erred in giving the jury the following instruction:

> "The defendant has offered himself as a witness and has testified in the case. Having done so you are to estimate and determine his credibility in the same way as you would consider the testimony of any other witness. *It is proper to consider all of the matters that have been suggested to you in that connection, including the interest that the defendant may have in the case, his hopes and fears, and what he has to gain or lose as a result of your verdict.*"

We have italicized the portion of this instruction which we deem to be erroneous and prejudicial. That portion adds nothing to the principle of law in the remaining portion. It cannot have been given for any other purpose than to discredit the defendant in the eyes of the jurors. The giving of such an instruction has frequently been condemned by the courts. (*Hicks v. U. S.*, 150 U. S. 442; *Allison v. U. S.*, 160 U. S. 203; *Williams v. U. S.* (9th Cir.), 93 F. (2d) 694; *People v. Maughs*, 149 Cal. 253, 263; *People v. Van Ewan*, 111 Cal. 144; *People v. Winters*, 125 Cal. 329.)

In *Williams v. U. S.*, 93 Fed. (2d) 694, the court said:

> "In the instant case, the lower court already had instructed the jury that it would be proper to consider 'the interest which such defendant may have in the case, his hopes and his fears, and what he has to gain or lose as a result of your verdict.' The

propriety of even such an instruction has been doubted by the Supreme Court. In Hicks v. United States, 150 U. S. 442, 452, 14 S. Ct. 144, 147, 37 L. Ed. 1137, that tribunal said:

'It is not unusual to warn juries that they should be careful in giving effect to the testimony of accomplices; and perhaps a judge cannot be considered as going out of his province in giving a similar caution as to the testimony of the accused person. Still it must be remembered that men may testify truthfully, although their lives hang in the balance, and that the law, in its wisdom, has provided that the accused shall have the right to testify in his own behalf. Such a privilege would be a vain one if the judge, to whose lightest word the jury, properly enough, give a great weight, should intimate that the dreadful condition in which the accused finds himself should deprive his testimony of probability. The wise and humane provision of the law is that "the person charged shall, at his own request, but not otherwise, be a competent witness." The policy of this enactment should not be defeated by hostile comments of the trial judge, whose duty it is to give reasonable effect and force to the law.

'See, also, Allison v. United States, 160 U. S. 203, 207, 208, 16 S. Ct. 252, 40 L. Ed. 395.

'However that may be, it was clearly reversible error for the learned District Judge, after already having given the general instruction as to the defendant's interest in the case, to refer to it again in connection with the comparison with Cassidy's interest therein. As was said by Mr. Chief Justice Hughes in Quercia v. United States, *supra*, 289 U. S. 466, at page 470, 53 S. St. 698, 699, 77 L. Ed. 1321, "It is important that hostile comment of the

judge should not render vain the privilege of the accused to testify in his own behalf.

'The closing language of the opinion in Hunter v. United States, *supra*, 62 F. 2d 217, at page 220, is applicable to the lower court's activities in the instant case, both with respect to the examination of witnesses and the instructions to the jury.

'That the district judge did not intend to be unfair is beside the question. The case was tried in such a way that the jury, in considering as a whole the judge's questions and charge, might well have reached the conclusion that he was not impartial, but was insisting upon a conviction. It is vastly more important that the attitude of the trial judge should be impartial than that any particular defendant, however guilty he may be, should be convicted. It is too much to expect of human nature that a judge can actively and vigorously aid in the prosecution and at the same time appear to the layman on the jury to be impartial.' "

In *People v. Maughs*, 149 Cal. 253, the Supreme Court considers itself bound by the decisions in the earlier case of *People v. Cronin*, 34 Cal. 191, in which such an instruction was given. But in *People v. Maughs*, after citing the more recent cases in which such instructions had been criticized, the court said:

"And after all this admonition, after all these cautions, the conclusion is forced upon us that when a trial judge does give this instruction to a jury it can be with no other purpose than to throw his judicial weight into the scales against the defendant on trial before his court. For this reason therefore, we think the time has come to say that in all future cases which shall arise, and where, after this warning, this instruction shall be given, this court will

hold the giving of it to be so prejudicial to the rights of a defendant, secured to him by our constitution and laws, as to call for the reversal of any judgment which may be rendered against him."

In *People v. Boren*, 139 Cal. 210, 215, the court said:

"We again feel constrained to say, as was said in People v. Van Ewan, that it is difficult to logically attribute the giving of any instruction whatever on the subject of defendant's testimony to anything else than a purpose to expressly disparage a witness before a jury."

3. The trial court erred in refusing to give defendant's proposed instruction No. 19, as follows:

"You are instructed that by making a claim as defined in the statute, is meant the asking or demanding on the part of the defendant from the Government of payment for services. It is not the preliminary request for audit or inspection and approval of the items that constitutes the making of a claim, but it is the actual claim itself after the same has been submitted for audit and approval and submitted to the Navy Department for payment, that constitutes the claim within the meaning of the statute.

"United States v. Bittinger, 24 Fed. Cas. No. 14,599." [R. 703.]

4. The defendant was entitled to this instruction so that the jury would know what a claim was within the meaning of Count IV of the indictment.

Lieutenant Minor testified claims for fixed-price items were prepared as follows:

"Mr. Zap, I believe, would be required to prepare an invoice, itemizing the particular item in question, stating that the job had been completed, and forward that claim to the Bureau of Supplies and Accounts in Washington via the Inspector of Naval Aircraft; the inspector would endorse the invoice or the letter, as the case may be, indicating therein if the contractor's claim as to the completion and the acceptability of the item was correct; and on the basis of the inspector's endorsement the Bureau would issue a check in payment of the item. *That particular voucher would not go through my office.* Under contract 83142 Mr. Zap would secure reimbursement under a cost plus fixed fee item.

"As he accumulated costs according to the particular contract, he would notify the cost inspector and request that the charges be audited and approved and the necessary vouchers prepared. After our office had conducted a preliminary audit and reviewed the items, the voucher would then be prepared, forwarded to Mr. Zap for his signature, then after being signed by the cost inspector would be forwarded to the disbursing officer in San Diego, who would prepare the check. The inspector I mean is the Inspector of Naval Aircraft. The documents underlying the voucher would generally be approved by the resident inspector. . . ." [R. 290, 291.]

XIII.

The Trial Court Erred in Refusing to Arrest Judgment.

Motions in arrest of judgment for defects in the indictment and procedure denied and exceptions noted. This was error.

Blitz v. U. S., 153 U. S. 308;

U. S. v. Simmons, 96 U. S. 361, 24 L. Ed. 819;

Kellerman v. U. S., 295 Fed. 796;

McKenna v. U. S., 127 Fed. 88;

U. S. v. Ford, 34 Fed. 26;

U. S. v. McGuire, 64 Fed. (2d) 485.

XIV.

In the Circuit Court of Appeals, the Appellant Filed His Brief, Together With a Statement of Jurisdiction on Appeal, Which Was Printed as a Separate Document and Copies of Which Have Been Furnished to This Court. Commencing on Page 7 of the Jurisdictional Statement, to and Including Page 22, Under the Heading "C," the Appellant Presents Forty-one Questions Raised by the Appeal.

The Circuit Court of Appeals affirmed the judgment without opinion upon the merits, on the ground that Rule 20 of its rules had not been complied with, in that errors assigned "but not specified may be deemed waived." However, there was not only no waiver of the assigned errors, but they were set out in our opening brief and in our statement on jurisdiction on the questions presented by this appeal.

Neither the respondent nor the Court was in any way deprived of full notice, but on the contrary, the Government itself set out in its brief "twelve basic challenges."*

It will thus be seen by an examination of the brief, wherein we set out, for instance under point I, the errors relied on under motion to suppress the evidence, which

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*"It appears from appellant's Brief that he relies upon twelve basic challenges upon which the Government's position is as follows:

I. Appellant's constitutional rights were not prejudiced by the inspection, audit and seizure of certain of his records, and the subsequent use thereof in evidence.

II. Counts IV and V of the Indictment are legally sufficient.

III. Appellant's motion for a bill of particulars was properly denied.

IV. The absence of women from the grand jury panel does not require that the conviction be reversed.

V. The District Court correctly refused to order the return to the defendant of papers and documents which Commander Smith of the Navy Department had in his custody.

VI. The District Court did not err in its procedure relative to the discharge of juror No. 2.

VII. The dismissal of the appellant on Count VI did not constitute an acquittal on Counts IV and V.

VIII. The District Court properly refused to direct a verdict for defendant on counts IV and V.

IX. The District Court did not alter the Indictment by its instructions.

X. The District Court's action in permitting Government counsel to refresh the recollection of a witness by the use of the transcript of his testimony before the grand jury and in refusing defense counsel the right to examine the grand jury transcript was proper.

XI. The District Court did not err in instructions given and refused.

XII. The District Court properly denied the motion in arrest of judgment wherein appellant charged that prejudicial error appeared on the face of the record and that the record failed to show facts essential to the verdict."

errors are again specifically set out before this Honorable Court. We respectfully submit that the purpose of assignments of errors and specifications of those relied upon is to apprise opposing counsel of what it has to meet and the Court on the questions that are being considered.

Opposing counsel and the court were fully apprised. The Court itself gave special permission to file a brief of 188 pages, and the Government's reply brief took 86 pages. It is respectfully submitted that there was substantial compliance within the rules of court of both assignments of errors and specifications of errors.

Lonergan v. U. S., 33, 34, 82 L. Ed. 630.

This court in the exercise of its supervisory powers over criminal procedure should grant this petition.

XV.

The Circuit Court Erred in Not Remanding the Case for the Taking of Testimony and Hearing on a Motion for a New Trial Because of a Forgery of a Document Presented in Evidence Against Petitioner.

Just before the close of the trial, petitioner's attention was first called to a document which was numbered page 5 of Exhibit 19. The document was on stress paper, the kind the petitioner used in making reports of a technical nature to the Navy Department. [R. 644, 645, 646.] The petitioner recognized his signature on the paper, but not the data above his signature. He explained that when he goes on a trip, he signs ahead of time for the Stress Department to file its reports and send its reports back to Washington, but why the document was there or how

or whether it ever got to the Navy Department was something the petitioner did not understand.

He was the next to the last witness, and only one other witness, a very short witness, followed him. The case thereafter was submitted to the jury.

The petitioner, immediately after the trial, caused a further investigation and examination to be made of the document by Lawrence Buys, an examiner of Government documents, formerly connected with the Federal Bureau of Investigation, and Buys gave his opinion that the document was a forgery, that the material above Zap's signature was typed in after he had signed his name on the paper.

Petitioner, on July 6, 1943, made a motion before the United States Circuit Court of Appeals to remand the case, pursuant to Rule 2, Subdivision 3, of the Rules of Criminal Procedure, for consideration of a motion for a new trial because of a conviction based upon a forged and counterfeit document. The Circuit Court of Appeals denied the motion without opinion. However, a member of the court, during the oral argument, expressed himself as of the view that discovery of a forgery was not newly-discovered evidence within the meaning of the rule. Exception was noted to the Circuit Court's ruling as soon as it was received.

We respectfully submit that the Circuit Court should have remanded the case to the trial court, as forgery is a species of perjury, which fatally infects any criminal trial where it occurs, nd the widest latitude should be allowed in preventing any conviction based upon perjured or forged testimony.

The Government, in offering this document to the court or jury, vouched for it as apparently genuine. *U. S. v.*

Corlin, 144 Fed. Supp. 940, 945. But if it was a fabrication it should be grounds for reversal.

The courts of the United States have been uniform in holding that no conviction should rest upon fabricated testimony.

Mooney v. Holohan, 294 U. S. 103, 79 L. Ed. 791

The use of forged documents in a criminal case to secure a conviction would offend the fundamental principles of justice, and would be contrary to fair trial. *Lisenba v. California*, 314 U. S. 219, 236, 237. We submit, therefore, that the defendant should have the right to establish these facts. It is respectfully submitted that the proper course to pursue under such circumstances is to permit a retrial on this question which reaches the very foundation of the conviction as to Counts 4 and 5.

Where circumstances appear subsequent to conviction that bear on validity of judgment, Circuit Court may remand cause to District Court to pass upon motion for a new trial.

Hamel v. U. S., 135 Fed. (2d) 969;

Hawkins v. U. S., 90 Fed. (2d) 551; certiorari denied, 302 U. S. 733.

Conclusion.

For each of the reasons set forth in this petition, it is respectfully prayed that this Honorable Court grant certiorari.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioner

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IN THE

Supreme Court of the United States

October Term, 1945

No. 489

EDWARD F. ZAP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF.

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REPLY BRIEF.

The Government concedes, as it must, that the affidavits for the search warrants, upon which the alleged search of Zap's premises were based, were invalid. The Government has stated "and at the close of their investigation, obtained a search warrant for petitioners' books and records on the basis of an affidavit, which we concede to be technically deficient in that it failed to set forth grounds for believing that petitioner had committed an offense. (Resp. Br. 12.)

The only basis for the seizure was the affidavit and the search warrant, and it was upon this basis that the trial court ruled.

The Government further concedes that there never was any search warrant nor was there any listing for the check of $4,000.00, which was Government's Exhibit 7, and formed the principal basis for appellant's conviction.

But the Government misstates in its brief "However, the F. B. I. agents were acting under the auspices and by the authority of the Navy Department." (Resp. Br. 13.) There is nothing in the record to show that the Navy Department ever gave any authority to make any inspection or that Congress ever gave any authority to seize where it designated only inspection.

The only authority which the F. B. I. claimed was that of a senior accountant, a senior cost inspector of the Navy. This is contrary to the provisions of Title 13 of the Second War Powers Act, 50 U. S. Code, Section 643, which only authorizes the Secretary of the Navy to grant authority or permission to make inspections to persons within his own branch of the Government. Here there is no authority shown by the Secretary of the Navy to anyone, much less the F. B. I., to inspect these books or records, or to take them.

The Government's brief raises the important point of whether F. B. I. Agents had authority to make any inspections where their only claimed authority was from a senior accountant, a senior cost inspector of the Navy (working in a clerical position) and where no such authority was ever granted or allowed by the Secretary of the Navy. The very statement seems to contain its own answer—that no such jurisdiction existed. To permit any civilian clerk working for one of the departments of the Government who has authority to inspect books to delegate that authority to someone not authorized would go far beyond the congressional purposes and open up the Government's storehouse of confidential information through clerks and attaches, which obviously was never intended by Congress.

The Government's position raises an important question for this Court to decide as to whether the right of inspec-

tion includes the right of search and seizure and whether a subordinate may delegate his individual right of inspection to a department not specifically authorized by the executive order.

This Court has held that the power of subpoena may not be delegated where not specifically authorized by Congress.

Cudahy Packing Co. v. Holland, 315 U. S. 357.

The respondent furthermore confuses the right of inspection by a department specifically authorized to audit them for its own purposes with the right of search and seizure by another department for prosecution, without search warrant. The respondent's brief misstates the fact when it says that the F. B. I. Agents were acting under the auspices and by the authority of the Navy Department, since the evidence in this case does not disclose that the Navy Department granted such authority. Such authority would have to come from the Secretary of the Navy or someone duly authorized by him to grant such authority, even if it were permissible and there was no evidence in the record to show that the Secretary of the Navy or anyone authorized by him gave such authority to the F. B. I. in this case. The fact that the petitioner's bookkeeper cooperated with the agents of the F. B. I. did not waive his constitutional rights.

Amos v. U. S., 65 L. Ed. 654.

A similar case was seen in *Gouled v. U. S.*, 65 L. Ed. 647.

The Government further admits that Government's Exhibit 7, the $4,000.00 check, is not specifically mentioned in any return of the search warrants (page 10). Nor was it ever specifically described in any search warrants.

The $4000 check was not a "claim" as charged in Count IV.

The Government says that if inspection had been resisted, the Government would have been required to resort to a court order to obtain the documents, but the affidavit of the petitioner's bookkeeper establishes that she cooperated with the agents. But no employee has a right to "cooperate with the agents" of the F. B. I. in a search and seizure without the consent of the owner.

Amos v. United States, 65 L. Ed. 145;
Gouled v. United States, 65 L. Ed. 647;
U. S. v. Lefkowitz, 285 U. S. 452.

The Government has not touched on our question of the sufficiency of the evidence for a directed verdict as to lack of guilty knowledge on the part of the defendant. It has also tried to justify what it concedes to be possibly an incorrect instruction and an incorrect definition of the word "willful" with the fact that the court gave other instructions which it claims were correct. But the giving of a bad instruction is not cured by the giving of correct instructions.

We believe the other matters have been sufficiently covered in our opening brief and in our petition, for which reason we respectfully request that certiorari be granted.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Plaintiff.

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IN THE

Supreme Court of the United States

October Term, 1945

No. 489

EDWARD F. ZAP,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF.

To the Honorable Harlan F. Stone, Chief Justice and to the Honorable Associate Justices of the Supreme Court of the United States:

Opinion Below.

The opinion of the Circuit Court of Appeals [R. 805-807] is reported in 151 Fed. (2d) 100, 101.

Jurisdiction.

The decision of the Circuit Court of Appeals affirming the judgment below was filed June 4, 1945. [R. 807, 808.] A petition for rehearing, duly filed, was denied September 13, 1945. [R. 809.] The petition for writ of certiorari was filed October 8, 1945, and was denied December 10, 1945. On petition for rehearing filed January 2, 1946, certiorari was granted January 7, 1946.

The jurisdiction of the Supreme Court is conferred by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules 11 and 13 of the Criminal Appeals Rules promulgated by the Supreme Court May 7, 1934. The petition for rehearing was filed pursuant to Rule 33 of the Rules of the Supreme Court.

Short Statement of the Case.

Appellant, Edward F. Zap, one of the foremost experimental aviation engineers in the United States, was a private contractor, having prime aviation experimental contracts with the Government of the United States. He kept books and records [Govt's Exhibits 34 to ~~36~~ 32] and had various bank accounts, both relating to his business [Exhibit 32] with the Navy and to his private accounts. [Exhibit 7.] Because of the need of great secrecy in relation to his type of experimental work, which involved the shortening of the distance for a plane to take off and land aboard ship and on land [R. 562, *et seq.*] and other matters relating to the war effort, all of his books and records were kept in private safes in his private office.

Pursuant to the provisions of Title 10, Section 310(1) as amended by the Second War Powers Act, Title 50, Section 643 and the President's Executive Order No. 9127, the Navy had cost inspectors in Zap's plant from time to time, who were permitted to examine the books and records for their own department, the Navy. [R. 291, 489, 490.]

Appellant was convicted on counts IV and V of an indictment charging him with violation of Title 18, Section 80, in the District Court of the United States, Southern District of California, Central Division.

Count IV charged the appellant with unlawfully, knowingly, wilfully and feloniously making and presenting a

false claim for payment and approval by the Navy. [R. 8-9.]

Count V charged appellant with having covered up and concealed, by trick, scheme and device, a material fact, and made and caused to be made a false and fraudulent statement and representation in a matter within the jurisdiction of the United States Navy.

The means alleged in Count V was that he represented to Hilton Byars, who was then and there the Navy Cost Inspector, that the sum of $4,000.00 had been paid to William H. McAvoy for acting as a test pilot in conducting certain tests under appellant's Contract No. 83142 and that he presented to said Cost Inspector in support of said false statement and representation a cancelled check for $4,000.00 endorsed by said William H. McAvoy. [R. 9, 10, 11.]

In the trial of the case, the books and records of the appellant which had been searched and seized on a search warrant admittedly defective because of the affidavit in support thereof and the check for $4,000.00, which had been secured from a bookkeeper of the appellant from appellant's private safe during appellant's absence from the city, were introduced in evidence against the petitioner and used to convict him, after timely motions to suppress and return the evidence had been denied and subsequent objections to the introduction of the books and records in evidence overruled, and motion to strike the check for $4,000.00 denied, each of them being made upon the grounds that the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States had been and were being violated, and exceptions noted.

The books and records thus used formed the principal basis of the testimony against appellant. [R. 368 *et seq.*]

The testimony of Lucien Smith Minor, the testimony of Thomas Cedric Browne [R. 419 *et seq.*], the testimony of Ethel Boyle [R. 467 *et seq.*, 473 *et seq.*], the testimony of Harry Champlin [R. 481, 484 *et seq.*], testimony of Hilton Jack Byars [R. 505, 506 *et seq.*], testimony of Ethel Boyle. [R. 554, 555.] See also objections to final introduction of books and records in evidence. [R. 665.]

Naval procedure was set up for correcting mistakes and otherwise reviewing matters, if either the Government or the contractor desired it.

The essential facts of the inspection and examination of the books and records in Zap's absence and without his consent by Agents of the F. B. I., of their subsequent search and seizure on faulty and insufficient affidavit in support of a purported search warrant, and their subsequent use in evidence over vigorous objections of the defense, after timely motions to suppress had been denied, are uncontroverted.

THE INITIAL INSPECTION BY F. B. I. AGENTS.

On October 20, 1942, after Zap left for Washington, D. C. and while he was gone, and without his knowledge or consent, F. B. I. Agents Myerson and Sloane came to Zap's plant and commenced searching books and records of Zap's plant. [R. 135, *et seq.*]

Daily they went through the books and records of the petitioner, in his absence. They got employees in his service to get private books and records out of his private files and safes, out of his private office. [R. 151.] According to the affidavit of Ethel Boyle, bookkeeper.

> "They commenced searching the premises and went into the back of the office and into Mr. Zap's private office; that they returned from that time on daily and

spent considerable time each day in the said offices; that at no time on any of these daily visits did they ever * * * display or hold any search warrant." [R. 151, 152.]

"That they frequently asked affiant to get different books from the safe and examined same. That the safe was always locked and had to be opened, and the F. B. I. officers asked affiant to open the same each morning and whenever they wanted something out of it; this took place all through November, 1942. [Affidavit of Ethel Boyle, R. 153.]

"That she personally observed Murray B. Myerson and James S. Sloane examining these documents and records over a period of several days during November, 1942, and making notes thereon; that James S. Sloane copied and made notes on work sheets from the books, and on one occasion he came to affiant and said he could not make his sheets balance and asked affiant if she had a balance and to compare his figures with hers; that ~~he then~~ showed affiant a search warrant to examine or look at these books; they are the books taken on December 1, 1942. (R. 155)

he at no time

"That some time on or about November 5, 1942, which date affiant recalls was the date of Mr. Zap's arrest, Mr. Murray B. Myerson came to affiant and said he wanted to get a cancelled check for $4,000[1] which was made out to William H. McAvoy; that at that time he had no search warrant for the same and did not display any; that affiant showed him where the check was in the file and he asked for it and affiant gave it to him; affiant also opened up the safe

[1]This later became Government's Exhibit No. 7. Motions in advance of trial to suppress and return it were denied. Motion to strike was also denied. Exceptions noted.

daily from November 5th until December 4th or 5th, 1942, for Mr. Myerson and Mr. Sloane and they went into the safe and took such books and records as they wanted with them to another part of the building, and would bring them back later in the day, and then the next day they would again ask for the books and records and again take them to another part of the building, returning them to affiant later in the day to lock in the safe." [R. 155, 156.]

This affidavit was corroborated by the affidavit of Estelle Zap. [R. 156.] None of the affidavits of the inspection without a search warrant were denied or controverted.

Hilton Byars, a senior accountant, a civilian, employed by the United States Navy, filed an affidavit in which he stated that two F. B. I. agents, to-wit, Murray B. Myerson and James C. Sloane, connected with offices at Los Angeles, for a period of six or seven weeks, commencing on or about October 20, 1942, made an audit and inspection of the books of account and record of Edward F. Zap at Zap's place of business, 1005 Broxton Avenue, Los Angeles, California, "under the auspices of and by and with the authority of your affiant and Lieutenant Lucien Smith Minor of and for the United States Navy." [R. 193-194.] Minor was also a Navy cost inspector assigned to Zap's plant.

Byars stated:

"That at all times during said period from on or about October 20, 1942, to and including the 1st day of December, 1942, all said books of account and records of Edward F. Zap pertaining to and under said contracts were within the custody of the United States Navy, pursuant to said contracts and the terms and provisions thereof, and said United

States Navy refused and declined to permit any person whatsoever to remove any of said books of account and records, or either of them, without a warrant." [R. 195.]

On or about November 6, 1942, Zap called a meeting of his several employees, and in the presence of Myerson and Sloane objected to their entering his safe and using Champlin, saying, "It is not right for you to go in there and use Champlin, as he is the crook and is trying to smear me. He has already been fired and has no right to be in the office, and no one has any right to look at these papers as they are the confidential papers of Edward F. Zap Aeronautical Engineers and concern their contracts with the navy." That the said Myerson and Sloane did not at that time have any search warrant for the examination of the books, papers, records, ledgers, ledger sheets, cost sheets, payroll accounts, journals and documents. [R. 149.]

When Zap protested that no one had any right to enter the safe and look at these confidential records and documents Myerson said he was going to examine them for himself and find out what facts he could, and stated to Zap, "You had better go on home and have a scotch and soda and forget your troubles here." [R. 149.]

Ethel Boyle also made an affidavit that all of these books, records and documents were in a safe or in the personal desk of Mr. Zap and could not be observed, but that from time to time these F. B. I. agents asked her to open the safe each morning, and whenever they wanted to get something out of it, and that as a result they continued their inspection during the month of November. [R. 153-156.] This is corroborated by the affidavit of Estelle Zap. [R. 157-160.]

INSUFFICIENT AFFIDAVIT USED TO SECURE SEARCH WARRANT.

On December 1, 1942, Myerson made an affidavit for a search warrant pursuant to which search warrant he seized, according to his return, the exhibits which were later admitted in evidence as Exhibits 32, 34 to 45 in evidence. This affidavit did not set forth the commission of any crime or any probable cause. [R. 177-9.]

THE ADMITTED SEARCH AND SEIZURE.

By their own affidavit and return, F. B. I. Agents Murray B. Myerson and James S. Sloane admit that they made both a search and seizure on December 1 of books and records which were later introduced in evidence over objections that they were illegally searched and seized.

Agents Myerson and Sloane in their return to the search warrant said:

> "Pursuant to the within search warrant, there were seized at the office of the Zap Aeronautical Engineers, 1005 Broxton Avenue, Westwood Village, Los Angeles, Calif., the following:
>
> "1. Job Cost Ledger—Fixed Fee.
>
> 2. Job Cost Ledger.
>
> 3. General Ledger, and transfer sheets.
>
> 4. Combination cash book, check register and journal.
>
> 5. Payroll ledger and transfer sheets.
>
> 6. Invoice received from University of Washington, Seattle, Wash., dated Aug. 28, 1942.

7. Two books of check stubs.

8. Time cards for weeks ending Sept. 30, 1942, and Oct. 7, 1942.

9. Vouchers and supporting papers relative to contract NXs-4105.

10. Vouchers and supporting papers relative to contract 83142.

11. Cancelled checks of E. F. Zap Aernautical Engineers and E. F. Zap 9 pckgs. Mar. to Nov., 1942."

In advance of trial, motions were made to suppress and return the evidence thus illegally searched and seized. [R. 128, *et seq.*] The court denied the motions [R. 33, 203, 204], exception noted.

During the trial of the case, objections were made to the use of the books and records on the grounds that they violated the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States, and motions were made to suppress the evidence. These motions were denied and exceptions allowed. [R. 368, 380, 419-20, 553.]

Questions Presented by This Appeal.

WHETHER THE BOOKS AND RECORDS RELATING TO THE APPELLANT'S CONTRACT WITH THE NAVY DEPARTMENT WERE PROPERLY ADMITTED AS EVIDENCE AT HIS TRIAL.

Summary of the Argument.

I.

THE INITIAL INSPECTION OF THE BOOKS AND RECORDS BY AGENTS OF THE F. B. I. WAS UNAUTHORIZED AND UNLAWFUL, AND VIOLATED THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES. TITLE 10, SECTION 310L, WAS ONLY MEANT TO AUTHORIZE ADMINISTRATIVE INSPECTION AND AUDIT, AND NOT INVESTIGATION AND SEARCH AND SEIZURE FOR CRIMINAL PROSECUTION.

II.

THE AUTHORITY TO INSPECT AND AUDIT IS LIMITED DIRECTLY TO THE AGENCIES DESIGNATED BY THE STATUTE AND THE EXECUTIVE ORDER OF THE PRESIDENT PURSUANT THERETO, AND CANNOT BE DELEGATED BY A SUBORDINATE IN THE NAVY DEPARTMENT.

III.

THE ADMITTED SEARCH AND SEIZURE OF DEFENDANT'S BOOKS AND RECORDS, PURSUANT TO THE SEARCH WARRANT OF DECEMBER 1, WHICH THE GOVERNMENT CONCEDES WAS OBTAINED ON AN INSUFFICIENT AFFIDAVIT, WERE IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

IV.

THE DISTRICT COURT ERRED IN REFUSING TO SUPPRESS AND RETURN THE EVIDENCE THUS UNLAWFULLY SEARCHED AND SEIZED UPON TIMELY MOTIONS TO DO SO.

V.

THE USE IN EVIDENCE OF SUCH BOOKS AND RECORDS VIOLATED THE DEFENDANT'S RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT.

I.

The Initial Inspection of the Books and Records by Agents of the F. B. I. Was Unauthorized and Unlawful and Violated the Defendant's Rights Under the Fourth and Fifth Amendments to the Constitution of the United States. Title 10, Section 310L Was Only Meant to Authorize Administrative Inspection and Audit, and Not Investigation and Search and Seizure for Criminal Prosecution.

The authority to audit and inspect the books and records of prime contractors was an administrative authority. Title 10, Section 310L as amended by the Second War Powers Act, Section 1301; *et seq.*

Congress was interested in encouraging aviation and to keep correct accounts when it passed Title 10, Section 310L, permitting auditing and inspection of defense prime contractors' books, pursuant to the purposes of that statute. The Second War Powers Act, amending this section, specifically authorized the President to designate who might inspect the books and records of such defense prime contractors. Pursuant to this authority, the President of the United States issued his executive order 9127 (7 F. R. 2753), in which he specifically designated the right of inspection to be exercised by the Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the United States Maritime Commission, and the Board of Directors of the Reconstruction Finance Corporation, respectively, or in their discretion and by their direction, respectively, may be exercised also by and through any officer or officers or civilian officials of their respective departments and agencies designated by them for those purposes.

The F. B. I. was not an agency so designated by the Act or Executive Order. The Secretary of the Navy at no time ever designated any F. B. I. agent or civilian to act.

The only person who claimed to have given any authority to Agents Myerson and Sloane was the civilian Inspector Byars, who, of course, had no authority under the Act to do so. He was not the head of the department. Agents Myerson and Sloane were not in his department.

Executive Order 9127 (7 F. R. 2753) provides as follows:

> "1. I hereby designate the War Production Board, the War Department, the Navy Department, the Treasury Department, the United States Maritime Commission, and the Reconstruction Finance Corporation as the governmental agencies authorized to inspect the plant and to audit the books and records, as provided by Title XIII of the said Second War Powers Act, 1942."
>
> "2. The authority herein conferred may be exercised by the Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the United States Maritime Commission, and the Board of Directors of the Reconstruction Finance Corporation, respectively, or in their discretion and by their direction, respectively, may be exercised also by and through any officer or officers or civilian officials of their respective departments and agencies designated by them for those purposes. The Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the United States Maritime Commission, or the Board of Directors of the Reconstruction Finance Corporation may authorize

such officer or officers or civilian officials of their respective departments or *agencies to make further delegations of such powers and authority within their respective departments and agencies.*" (Italics ours.)

According to the affidavit, another civilian Navy auditor, Greenfield, objected to the F. B. I. agents searching the books and records without any court authority, but his objections were ignored.

Even civilian inspector Byars said that he gave the F. B. I. agents permission but did not let them remove the books and records without a search warrant. Byars said that "Said United States Navy refused and declined to permit any person whatsoever to remove any of said books of account and record, or either of them, without a warrant." [R. 194-195.]

It is respectfully submitted that the initial inspection by the F. B. I. was without warrant or authority in law.

The President's Executive Order 9127 (F. R. 2753).

The mode is the measure of power.

The *mode* prescribed in a statute for the exercise of a power is the "measure the power", and this rule is especially applicable to constitutional provisions.

People v. Gurin, 85 Cal. 238;

Michelson v. Painter, 35 Cal. 705;

Zottman's Case, 20 Cal. 102;

Simpson v. Nielson, 77 Cal. 297;

Compton v. Northwest Eng. Co., 116 Cal. App. 523.

Silverthorne Lumber Co. v. U. S., 251 U. S. 385.

II.

The Authority to Inspect and Audit Is Limited Directly to the Agencies Designated by the Statute and the Executive Order of the President Pursuant Thereto, and Cannot Be Delegated by a Subordinate in the Navy Department Even if the Authority to Audit and Inspect Extended to the Navy Department There Was No Authority of a Subordinate to Delegate It to the F. B. I.

Authority to delegate the right of inspection must be conferred either by statute or the executive order issued pursuant thereto. Otherwise, the power does not exist.

Cudahy Packing Company v. Holland, 315 U. S. 357, 363.

The right of inspection has always been and must be differentiated from the right of search and seizure.

People v. Richter (N. Y.), 265 App. Div. 767.

The authority to inspect the books and records of the petitioner was specifically limited by statute and executive order to the heads of the designated agencies and to those specifically delegated by the heads of those agencies in their respective departments.

Such statutory authority is limited to those particular persons so designated. The Government concedes that the affidavit in support of the search warrant was faulty. Therefore, all that had been searched prior to that time

and seized, based upon the faulty warrant, were in violation of the defendant's Constitutional rights.

Silverthorne Lumber Co. v. U. S., 251 U. S. 385, 64 L. Ed. 319;

Goldstein v. U. S., 316 U. S. 114, 127, 86 L. Ed. 1321;

Feldman v. U. S., 322 U. S. 487, 88 L. Ed. 1408.

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all . . . the knowledge gained by the Government's own wrong cannot be used by it in the way proposed."

Silverthorne Lumber Co. v. U. S., 251 U. S. 385.

The guaranties of the Fourth Amendment "are to be liberally construed to prevent impairment of the protection extended." *Grau v. United States*, 287 U. S. 124, 128, 77 L. Ed. 212, 215, 53 S. Ct. 38, and cases cited."

III.

The Admitted Search and Seizure of Defendant's Books and Records, Pursuant to the Search Warrant of December 1, Which the Government Concedes Were Obtained on an Insufficient Affidavit, Were in Violation of Defendant's Constitutional Rights Under the Fourth Amendment to the Constitution of the United States.

F. B. I. agents Myerson and Sloane admitted in their return to the search warrant of December 1, 1942, that they had made a "search and seizure" of the books and records of the petitioner. [R. 176.] It has since been admitted that the affidavit upon which this search was made was insufficient, and therefore null and void.

In the Government's brief in opposition to the petition for certiorari, the Government says:

> "As to the records introduced against petitioner, the significant facts are that F. B. I. agents, acting under the authority of the Navy, conducted an audit of petitioner's books; that in the course of that examinaion they kept possession of Exhibit 7 (the $4,000 check to test pilot McAvoy); and, at the close of their investigation, obtained a search warrant for petitioner's books and records *on the basis of an affidavit, which we concede to be technically deficient in that it failed to set forth grounds for believing that petitioner had committed an offense.*" (Government's Brief pp. 11 and 12.)

The Government also says:

"Since the examination of petitioner's records was proper, *the technical invalidity of the affidavit by which the search warrant of December 1 was obtained does not,* we submit, render the documents inadmissible in evidence." (Italics ours.) (Government's Brief p. 14.)

Grau v. U. S., 77 L. Ed. 212, and cases cited therein.

Therefore, the timely motions to suppress the evidence thus seized should have been granted.

Weeks v. U. S., 232 U. S. 383, 58 L. Ed. 542, 34 S. Ct. 341;

Boyd v. U. S., 29 L. Ed. 752;

Byers v. U. S., 71 L. Ed. 520;

Grau v. U. S., 77 L. Ed. 212, and cases cited.

IV.

The District Court Erred in Refusing to Suppress and Return the Evidence Thus Unlawfully Searched and Seized Upon Timely Motions to Do So.

Timely motions were made to suppress the evidence in advance of trial, which motions were denied by the court. Government's Exhibit 7, for which no search warrant was ever secured, nor was there any specification thereof, as it had been seized on November 5, 1942, and not on December 1, 1942, pursuant to the search warrant based upon the faulty affidavit, was illegally introduced in evidence over a prior motion to suppress and return it, and also through a motion to strike the evidence.

The Fourth Amendment.

Weeks v. U. S., 232 U. S. 383, Title 18, Section 626.

"**Sec. 626. Restoration of property taken; retention of custody of property by officer or other disposition.** If it appears that the property or paper taken is not the same as that described in the warrant or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the judge or commissioner must cause it to be restored to the person from whom it was taken; but if it appears that the property or paper taken is the same as that described in the warrant and that there is probable cause for believing the existence of the grounds on which the warrant was issued, then the judge or commissioner shall order the same retained in the custody of the person seizing it or to be other-

wise disposed of according to law. (June 15. 1917, c. 30, Title XI, Sec. 16. 40 Stat. 229.)"

Title 18, U. S. C. A., Criminal Code and Criminal Procedure.

But if we were, for the sake of argument, to pass by the search, we still have the problem of illegal seizure, for the Fourth Amendment to the Constitution of the United States forbids not only illegal search, but illegal seizure.

Boyd v. U. S., 116 U. S. 616, 641, 29 L. Ed. 752;
Takahashi v. U. S., 143 Fed (2d) 118.

The Fourth Amendment forbids two things: (1) illegal search; (2) illegal seizure.

It is not contended that the statute which permits audit and inspection permits seizure.

The guarantees of the Fourth Amendment are to be liberally construed to prevent impairment of the protection extended.

Grau v. U. S., 77 L. Ed. 212.

The motions, therefore, to suppress the evidence should have been granted and the objections to their introduction in evidence should have been sustained [R. 128, *et seq.*; R. 663, *et seq.*] as violative of the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States.

The court's rulings were directly in violation of the defendant's rights under the Fourth and Fifth Amendments, and the statutory provisions, Title 18, Sections 611 to 616, and the mandate of Section 626, Title 18, U. S. Codes, inclusive, pursuant thereto.

V.

The Use in Evidence of Such Books and Records Violated the Defendant's Rights Under the Fourth and Fifth Amendments to the Constitution of the United States.

There is also another element in this case, even if we were to pass both the search and seizure. The use in evidence of these books and records is forbidden by the Fifth Amendment to the Constitution of the United States.

Boyd v. U. S., 29 L. Ed. 752;

Takahashi v. U. S., 143 Fed. (2d) 118.

By a long line of cases, the constitutional provisions against unlawful search and seizure and their use in evidence against an accused have been steadfastly upheld.

Weeks v. U. S., 232 U. S. 383, 58 L. Ed. 542, 34 S. Ct. 341;

Boyd v. U S., 29 L. Ed. 752;

Byers v. U. S., 71 L. Ed. 520;

Grau v. U. S., 77 L. Ed. 212, and cases cited;

Feldman v. U. S., 88 L. Ed. 1414.

The search and seizure of any papers under the circumstances of this case and the subsequent use of such papers as evidence against the owner thereof violate the defendant's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States.

Entick v. Carrington, 19 Howard St. Tr. 1029;

Boyd v. U. S., 116 U. S. 616;

Weeks v. U. S., 232 U. S. 383;

Gouled v. U. S., 255 U. S. 298;

Byars v. U. S., 273 U. S. 28;

Go-Bart Importing Co. v. U. S., 282 U. S. 344;

U. S. v. Lefkowitz, 285 U. S. 452.

This case is comparable with the case of *U. S. v. Lefkowitz*, 285 U. S. 452, 467, where this court said that searches and seizures of the books and records could not be seized for the purpose of using them as evidence, and quoted with approval:

> "'Any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the 4th and 5th Amendments run almost into each other.' And this Court has always construed provisions of the Consitution having regard to the principles upon which it was established. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions."
>
> 285 U. S. 456, 77 L. Ed. 883.

Like the *Lefkowitz* case, the papers and other articles seized and taken were in themselves unoffending. This court there said:

> "Here, the searches were exploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime. Though intended to be used to solicit orders for liquor in violation of the Act, the papers and other articles found and taken were in themselves unoffending."

In *Entick v. Carrington*, 19 Howard St. Tr. 1029, a case of seditious libel, the famous Lord Justice said that such a search is the means of detecting offenders by discovering evidence, but the court held that in the criminal law, such a proceeding was never heard of, saying:

> "But our law has provided no paper search in these cases to help forward the conviction."

The case is quoted at length with approval in *Boyd v. U. S.*, 116 U. S. 616, 629, 29 L. Ed. 746, 750.

This doctrine is also approved in *Weeks v. U. S.*, 232 U. S. 383, where the court ordered the papers suppressed and returned. Also in *Gouled v. U. S.*, 255 U. S. 298, and in *U. S. v. Lefkowitz*, 285 U. S. 452.

In *Byars v. U. S.*, 273 U. S. 28, 71 L. Ed. 520, the court said:

> "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional system, that evidence of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed. Weeks v. United States, 232 U. S. 383, 393, 58 L. ed. 652, 655, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177; Gouled v. United States, 255 U. S. 298, 306, 65 L. ed. 647, 651, 41 Sup. Ct. Rep. 266; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 391, 64 L. ed. 319, 321, 24 A. L. R. 1426, 40 Sup. Ct. Rep. 182; Agnello v. United States, 269 U. S. 20, 33, 70 L. ed. 145, 149, 46 Sup. Ct. Rep. 4."

> ". . . evidence secured through unreasonable search and seizure by federal officials is inadmissible in a federal prosecution, Weeks v. United States, 232

U. S. 383, 58 L. ed. 652, 34 S. Ct. 341, L. R. A. 1915 B, 834, Ann. Cas. 1915C 1177, *supra;* Gouled v. United States, 255 U. S. 298, 65 L. ed. 647, 41 S. Ct. 261; Agnello v. United States, 269 U. S. 20, 70 L. Ed. 145, 46 S. Ct. 4, 51 A. L. R. 409."

Feldman v. U. S., 322 U. S. 491, 88 L. Ed. 1414.

"'. . . . knowledge gained by the Government's own wrong cannot be used by it.' Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392, 64 L. ed. 319, 321, 40 S. Ct. 182, 24 A. L. R. 1426. This Court has refused to draw nice distinctions as to when wrongful acquisition of evidence by state agencies was also a federal enterprise. When a representative of the United States is a participant in the extortion of evidence or in its illicit acquisition, he is charged with exercising the authority of the United States. Evidence so secured may be regained, Go-Bart Importing Co. v. United States, 282 U. S. 344, 75 L. ed. 374, 51 S. Ct. 153, and its admission, after timely motion for its suppression, vitiates a conviction. Byers v. United States, 273 U. S. 28, 71 L. ed. 520, 47 S. Ct. 248."

Feldman v. U. S., 322 U. S. 491, 88 L. ed. 1414.

Mr. Justice Black, in the same case, said:

"In Boyd v. United States, this Court said that 'any compulsory discovery by extorting the party's oath . . . is contrary to the principles of a free government. It is abhorrent . . . to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure at-

mosphere of political liberty and personal freedom.' 116 U. S. 616, 631, 632, 29 L. ed. 746, 751, 6 S. Ct. 524."

Feldman v. U. S., 322 U. S. 491, 88 L. ed. 1415.

And the *Boyd* case points out that using one's own books and records is compelling a person to be a witness against himself.

As Justice Black commented in the case of *Feldman v. U. S.*,

"And history supports no argument that the framers of the Fifth Amendment were interested only in *forbidding* the *extraction* of an accused's testimony, as distinguished from the *use* of his extracted testimony. The extraction of testimony is, of course, but a means to the end of its use to punish. Few persons would seriously object to testifying unless their testimony would subject them to future punishment. The real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminatory testimony was that thought to inhere in using a man's compelled testimony to punish him. By broadly outlawing the practice of compelling such testimony the Fifth Amendment struck at this evil at its source, seeking to eliminate the possibility that compelled testimony would ever be available for use to punish a defendant."

Footnote:

"See United States v. Burr (C. C.) Fed. Cas. No. 14,692e; Counselman v. Hitchcock, 142 U. S. 547, 564-566, 35 L. ed. 1110, 1114, 1115, 12 S. Ct. 195, 3

Inters. Com. Rep. 816; Brown v. Walker, 161 U. S. 591, 594, 600, 605, 606, 40 L. Ed. 819, 820, 822, 824, 16 S. Ct. 644, 5 Inters. Com. Rep. 369; cf. *Ex parte* Lange, 18 Wall. (U. S.) 163, 173, 21 L. ed. 872, 877. And see Pittman, op. cit., *supra,* note 11; and cases cited notes 5, 6, and 7, *supra.*"

Feldman v. U. S., 322 U. S. 491, 88 L. ed. 1414 at 1418.

Justice Black further said, in *Feldman v. U. S.*:

"As the Fifth Amendment heretofore has been interpreted, Feldman's testimony could not have been used for this purpose had it been compelled by a federal court rather than the state court. This would have been true whether the federal court proceeding had been non-criminal or criminal, and whether Feldman had testified as a mere witness or as a defendant. Nor could his forced testimony have been used had it been compelled by federal officers outside of a court room; by foreign detectives in a foreign country inquiring into commission of an offense against the United States committed on the high seas; or by state officers interrogating a suspect for the purpose of enforcing a federal law. There is, then, no sanction in the precedents of this Court for viewing the Fifth Amendment's prohibition against compelled testimony with grudging eyes and reducing its scope to the narrowest plausible limits. As the decisions reflect, the previously declared attitude of the Court toward this prohibition has been that it 'must have a broad construction in favor of the right which it was intended to secure.' Counselman v. Hitchcock, 142 U. S. 547,

562, 35 L. ed. 1110, 1113, 12 S. Ct. 195, 3 Inters. Com. Rep. 816; McCarthy v. Arndstein, 266 U. S. 34, 69 L. ed. 158, 45 S. Ct. 16, 4 Am. Bankr. Rep. (N. S.) 712."

Feldman v. U. S., 322 U. S. 491, 88 L. ed. 1416.

Conclusion.

Wherefore, the defendant prays that the judgments and each of them be reversed and that the court order the evidence suppressed in accordance with the Fourth and Fifth Amendments and Title 18, Section 626, and that the books, record and papers be ordered returned to the defendant.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Appellant.

APPENDIX.

Statutes Involved.

Sec. 80. *(Criminal Code, Section 35 (a).) Presenting False Claims.* Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. (Mar. 4, 1909, c. 321, Sec. 35, 35 Stat. 1095; Oct. 23, 1918, c. 194, 40 Stat. 1015; June 18, 1934, c. 587, 48 Stat. 996; April 4, 1938, c. 69, 52 Stat. 197.)

The Fourth Amendment to the Constitution of the United States, which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States, which provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, *without due process of law;* nor shall private property be taken for public use, without just compensation."

Title 18, Section 611, which provides:

"A search warrant authorized by this chapter may be issued by a judge of a United States district court, or by a judge of a State or Territorial court of record, or by a United States commissioner for the district wherein the property sought is located."

Title 18, Section 612:

"A search warrant may be issued under this chapter upon either of the following grounds:

"1. When the property was stolen or embezzled in violation of a law of the United States; in which

case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.

"2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.

"3. When the property, or any paper, is possessed, controlled, or used in violation of section 98 of this title; in which case it may be taken on the warrant from the person violating said section, or from any person in whose possession it may be, or from any house or other place in which it is concealed."

Title 18, Section 613:

"A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched."

Title 18, Section 614:

"The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them."

Title 18, Section 615:

"The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist."

Title 18, Section 616:

"If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office, to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States.

"Sec. 626. Restoration of property taken; retention of custody of property by officer or other disposition. If it appears that the property or paper taken is not the same as that described in the warrant or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the judge or commissioner must cause it to be restored to the person from whom it was taken; but if it appears that the property or paper taken is the same as that described in the warrant and that there is probable cause for believing the existence of the grounds on which the warrant was issued, then the judge or commissioner shall order the same retained in the custody of the person seizing it or to be otherwise disposed of according to law. (June 15, 1917, c. 30, Title XI, Sec. 16, 40 Stat. 229.)"

stating the particular grounds or probable cause of its issue and the names of the persons whose affi-

davits have been taken in support thereof, and commanding him forthwith to search the person or place named, for the property specified, and to bring it before the judge or commissioner."

U. S. Code Annotated, Title 50 (Sec. 643) War, p. 282, provides as follows:

"643. Plant, books, and records of war contractors; definition of defense contract; agency designated to administer provisions.

"The provisions of section 10 (1) of an Act approved July 2, 1926 (44 Stat. 787; 10 U. S. C. 310 (1) (giving the Government the right to inspect the plant and audit the books of certain Contractors), shall apply to the plant, books, and records of any contractor with whom a defense contract has been placed at any time after the declaration of emergency on September 8, 1939, and before the termination of the present war: Provided, That, for the purpose of this title, the term 'defense contract' shall mean any contract, subcontract, or order placed in furtherance of the defense or war effort: And provided further, That the inspection and audit authorized herein, and the determination whether a given contract is a 'defense contract' as defined above, shall be made by a governmental agency or officer designated by the President, or by the Chairman of the War Production Board. Mar. 27, 1942, 3 p.m., E.W.T., c. 199, Title XIII, 1301, 56 Stat. 185.

Executive Order No. 9127
April 10, 1942, 7 F.R. 2753

Inspection of Plants and Audit of Books of Defense Contractors

"By virtue of the authority vested in me by the Constitution and laws of the United States, and particularly by Title I of the First War Powers Act, 1941 (sections 601 *et seq.* of this Appendix), as President of the United States and Commander in Chief of the Army and Navy of the United States, and in order to prevent the accumulation of unreasonable profits, to avoid waste of Government funds, and to implement other measures which have been undertaken to forestall price rises and inflation, it is hereby ordered as follows:

"1. I hereby designate the War Production Board, the War Department, the Navy Department, the Treasury Department, the United States Maritime Commission, and the Reconstruction Finance Corporation as the governmental agencies authorized to inspect the plant and to audit the books and records, as provided by Title XIII of the said Second War Powers Act, 1942. Such inspection and audit and the determination whether a given contract is a defense contract, as defined in Title XIII of the Second War Powers Act, 1942, may be made in the case of (a) any contractor with whom a defense contract has been placed by such agency, or, in the case of the Reconstruction Finance Corporation, by any corporation created or organized by it, at any time after the declaration of emergency on September 8, 1939, and before the termination of the present war, and in the case of (b) any subcontractor performing work required by any such defense contract. The Chairman

of the War Production Board is authorized to issue rules and regulations and to establish policies to coordinate and govern the War Department, the Navy Department, the Treasury Department, the United States Maritime Commission, and the Reconstruction Finance Corporation in exercising the functions vested in them by this order.

"2. The authority herein conferred may be exercised by the Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the United States Maritime Commission, and the Board of Directors of the Reconstruction Finance Corporation, respectively, or in their discretion and by their direction, respectively, may be exercised also by and through any officer or officers or civilian officials of their respective departments and agencies designated by them for those purposes. The Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the United States Maritime Commission, or the Board of Directors of the Reconstruction Finance Corporation may authorize such officer or officers or civilian officials of their respective departments or agencies to make further delegations of such powers and authority within their respective departments and agencies.

"3. In inspecting any plant engaged in producing, manufacturing, processing, constructing, altering, or repairing any defense article of a secret, confidential, or restricted nature, or which is produced, manufactured, processed, constructed, altered, or repaired in accordance with or under any secret process, formula, patent, or invention, and in auditing the books and records in connection with any such defense contract, such inspection shall be regarded as secret, confiden-

tial, or restricted, as the case may be, and all reports, records, papers, documents, and writings relating to such inspection or audit shall be marked or stamped as secret, confidential, or restricted, as the case may be, and shall be handled in accordance with regulations prescribed and in force in the department or agency concerned relating to the handling of secret, confidential, or restricted matters, reports, records, papers, documents, and writings.

"4. The power to administer oaths or affirmations and to issue subpoenas for the attendance of witnesses or the production of books, records, or other documentary or physical evidence deemed relevant to the inquiry, conferred by section 1302, and, through the Department of Justice, the power to invoke the aid of any court of the United States, conferred by section 1303, Title XIII, of said Second War Powers Act, may be exercised, performed, or carried out by the Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, any member of the United States Maritime Commission, or the Chairman of the Board of Directors of the Reconstruction Finance Corporation, as the case may be, or by such other officer or officers or civilian officials as may be authorized, empowered or directed by any of them so to do for his respective department or agency.

"5. Nothing herein shall affect or limit the authority and power conferred upon or granted to the Chairman of the War Production Board by Title XIII of said Second War Powers Act, 1942."

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 489

EDWARD F. ZAP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

REPLY BRIEF

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Los Angeles 14, California,
Attorney for Appellant.

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I

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Government concedes search and seizure was not based upon a proper or valid search warrant but seeks to justify search and seizure under contract.

II

Such searches and seizures are not proper; contract is governed by statutes and permits only administrative inspection by the Navy Department and requires utmost secrecy. It was conceded F.B.I. not authorized to inspect under contract.

III

Both searches and seizures for evidences of a crime are forbidden by Fourth Amendment to the Constitution of the United States.

IV

Fifth Amendment forbids use in evidence of books and records secured by such searches and seizures.

V

Title 18, Section 612(2) U. S. C. A. requires valid search warrant for securing any instrumentalities used as the means of committing a crime and it is inherent therein that any other searches and seizures are forbidden.

VI

Title XIII of the Second War Powers Act (50 U. S. C. App., Supp. IV, 643(a)) provides for complete immunity guaranteed by Fifth Amendment to Constitution for any documentary evidence produced under compulsion showing that Congress intended to preserve all rights to defense contractors under Fifth Amendment against any use of their books or papers against them by granting immunity for their production.

VII

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There was never any contention of consent by the Government other than that of inspection through authority of the contract. Consent could not be granted in this case by an employee, and in fact was not granted, even if it could be. The Statute does not permit consent to be granted to anyone except authorized agencies.

VIII

The right to claim the privilege of the Fifth Amendment being personal, even in the absence of Statute, consent to the waiver of a constitutional right is also personal to the accused and should not be deemed given unless the record shows such consent clearly and understandingly given.

IX

In this case the books and records were illegally searched and seized after Zap had personally protested against unauthorized inspection and unauthorized going into his private safe.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 489

EDWARD F. ZAP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

REPLY BRIEF

The Government has conceded that the search and seizure of the petitioner's documents, books and records, Exhibits 5, 32, 34 to 45, 52, of December 1, 1942, were based upon a search warrant which was invalid because the affidavit in support thereof failed to set forth reasonable and probable cause as required by the Fourth Amendment and by Sections 613 to 616, Title 18, U. S. Code.

The essential requirements of a search warrant are that it must be based upon an affidavit setting forth facts showing reasonable and probable cause and upon facts that would be sufficient to satisfy a jury that there were grounds for believing that an offense had been committed. It is conceded that the search warrant and affidavit in support

thereof of December 1, 1942, failed to conform to these requirements.

See

Grau v. *United States*, 287 U. S. 124;
Nathanson v. *United States*, 290 U. S. 41;

In the trial court below it was claimed that the search and seizure were pursuant to the search warrant (R. 169, 171, 173). It was conceded by the language of the return to the search warrant that there was a search and seizure December 1, 1942, and that it was made pursuant to the search warrant (R. 176).

However, the Government has conceded that reliances based upon the search warrant for its search and seizure and the subsequent use in evidence of the documents cannot be sustained upon the invalid search warrant. And, although the taking was pursuant to the search and seizure upon an illegal warrant it now says it doesn't make any difference. It could take the papers and use them against the accused. It now seeks to justify its position upon the following untenable propositions:[1]

(1) That the contract of the petitioner authorized inspection by authorized agents of the government and that therefore it was proper for the F. B. I. to inspect the documents, books and records.

(2) That if upon their inspection, they came upon evidence of a crime, or if they upon their own views decided they were "instrumentalities of a crime" that they then had a right to seize the documents and carry them off without a search warrant; and

(3) Thereafter introduce them in evidence in the trial against the petitioner.

---

[1] In *U. S.* v. *Bosoni*, 57 F. (2d) 328, the court said that the government cannot rely upon a different ground than acted upon by the trial court.

In this respect the F. B. I. neither by the terms of the contract nor by statute had authority to inspect the contractor's books, plant or records.

In respect to the terms of the contract, the language of the contract in relation to the word surrounding it shows that it was meant solely for the administrative purposes for which it was designed, namely, to permit administrative inspection of the accounts and adjustments in aid of administrative work within the Navy itself.

On page 7 of the contract, the provisions of the contract upon which the respondent relies reads as follows:

> "For the purpose of determining the cost to the contractor of furnishing and delivering said supplies or services, the rules prescribed by Treasury Decision No. T. D. 5000 approved by the Secretary of the Treasury July 29, 1940, and by the Secretary of the Navy on August 6, 1940. The accounts and records of the contractor shall be open at all times to the Government and its representatives and such statements and returns relative to costs shall be made as may be directed by the Government. All information obtained from the contractor's accounts and records shall be treated as confidential."

The word "confidential" is defined in the Order of Franklin D. Roosevelt, as President of the United States, under Ex. Order No. 8381, 5 Fed. Reg. 1147, D. I. (Title 50, Section 45, 1945 Cum. Annual Pocket Part), as vital military and naval installations and equipment requiring protection against the general dissemination of information relative thereto and providing for fine and punishment for disclosing any matters classified or designated or marked as *confidential*, or secret or restricted by the Secretary of the Navy.

The Second War Powers Act further forbids, in Title 50, IV, Section 643 and Ex. Order 9127 pursuant thereto, any

person from inspecting the plants and auditing books of defense contractors except those agencies designated in the Act and Executive Order. These went into effect prior to the date of the return of this indictment and prior to the search and seizure of December 1, 1942. These measures of national security must be held to govern all contracts which they affect.

It was conceded by the Government in the oral argument that the F. B. I. was not one of the agencies designated by Executive Order 9127 (Title 50, App. Sec. 643, U. S. C. A., War Appendix, pages 269, 270, 271), that the Executive Order permits only persons in "the respective departments or agencies" to make any delegations of their powers and authority "within their respective departments and agencies." Therefore the F. B. I. derived no authority from the contract.

Therefore Hilton Byars, a civilian cost inspector in the Navy, had no right or power to permit any inspection of the books, records, and documents which were introduced against the petitioner. The government has not differentiated the inspection by authorized personnel employed either as civilian Navy personnel or military Navy personnel and under complete jurisdiction of the Navy with unauthorized inspection by members of the F. B. I. who possessed no authority either by statute or otherwise to make the inspection in question. Orderly administrative and military necessity command that this be so. The President had authority to include the F. B. I. but he didn't.

Passing therefore from the question of unlawful search by the F. B. I. on the unauthorized permission of a civilian auditor of the Navy, we come to the question of unlawful seizure. There is nothing in the statute or in the contract that permits the seizure of books, papers, documents and records, or their use in evidence in a criminal case. Here

the defendant had been arrested on November 5, 1942, and had been indicted on November 25, 1942, and again taken into custody on that date (R. 147). The seizure therefore of December 1, 1942, was not an incident to a lawful arrest nor were there any instrumentalities of the crime taken incidental to a lawful arrest.

It was never claimed by the Government in the Trial Court that any of these documents, including Government's Exhibit 7, were the *instrumentalities* of any crime. The documents are listed on pages 176 and 177 and are more fully described in the Prosecutor's own affidavit on pages 198 to 201 of the record, but Exhibits 5 and 52 were included in the general classification on the motion to suppress the evidence. All of them as pointed out by Justice Frankfurter are in themselves unoffending papers.

U. S. v. *Lefkowitz*, 285 U. S. 452, 467.

Exhibit 5 is a receipt for $300 from McAvoy (R. 302).

The cancelled checks described on page 200 of the record are cancelled checks of Edward F. Zap, Aeronautical Engineers and Edward F. Zap, 9 packages, March to November, 1942. "They were and are cancelled checks returned by the Bank to Edward F. Zap and all kept in the regular course of business." Their seizure at the time they were taken on Decembere 1, and under the circumstances as shown by their subsequent attempt to introduce them in evidence was merely for the purpose of securing evidence in proof of an alleged crime which according to the indictment, had occurred October 16 and September 13 and for which the petitioner had been indicted six days before. It was an exploratory search to secure evidence which has always been forbidden by the Fourth and Fifth Amendments.

Count IV relates solely to a claim against the government and the books and records are nowise other than evidence.

The indictment alleges that the offense defined in Count V was committed *in the following manner and by the following means:* (R. 10). It then alleges use of the check, Govt's Exhibit 7.

But this is exactly what the search warrant sections of Title 18 mean when it says that a *valid* search warrant may issue for the seizure of any property:

> "2. When the property was used *as the means of committing a felony;*" Title 18, Section 612, Sub. 2.

To hold as the government contends that unoffending papers, alleged in the indictment as the manner of means, could be seized without a valid search warrant, or if seized on an invalid search warrant, could nevertheless be used in evidence would be to emasculate the requirements of Title 18, Sections 611 to 633 and the Fourth and Fifth Amendments to the Constitution of the United States.

Go-Bart Importing Co. v. *United States,* 282 U. S. 374, 75 L. Ed. 344, said, approving:

> "• • • Gouled v. United States, 256 U. S. 298, 307, 65 L. Ed. 647, 651, 41 S. Ct. 261. The second clause declares, 'and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every state in the Union. Agnello v. United States, 269 U. S. 20, 33, 70 L. Ed. 145, 149, 51 A. L. R. 409, 46 S. Ct. 4. The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective

enforcement lest there shall be impairment of the rights for the protection of which it was adopted. Boyd v. United States, 116 U. S. 616, 623, 29 L. Ed. 746, 748, 6 S. Ct. 524; Weeks v. United States, 232 U. S. 389-392, 58 L. Ed. 654, 655, L. R. A. 1915B, 834, 34 S. Ct. 341, Ann. Cas. 1915C, 1177, *supra*."

The search and seizure thus six days after the return of the indictment could therefore only be a quest for evidence of an alleged offense committed on or about October 16 and September 23 and for which the indictment had been returned November 25.

Let it be kept in mind that there is no such thing known to Anglo-American law as a valid search, at any time, or at any place, or under any circumstances for papers to be used as evidence against an accused. Even a search warrant, issued with all formalities of law, will not avail for that purpose.

In *Entick* v. *Carrington*, 19 Howard St., Tr. 1029, the court said:

> "But our law has provided no paper search in these cases to help forward the conviction * * *."

This is quoted with approval in *Boyd* v. *U. S.*, 116 U. S. 616, 629.

And in *U. S.* v. *Lefkowitz*, 285 U. S. 452, the court defined the things that may not be taken, Justice Frankfurter reading the section in the oral argument.

See also:

Gouled v. *United States*, 255 U. S. 298;
Boyd v. *United States*, 116 U. S. 616;
U. S. v. *Lefkowitz*, 285 U. S. 452.

Government's Exhibit 7 was a check innocent of itself and could only be of value as evidence, and comes within the purview of the Fourth and Fifth Amendments.

It would enable the seizure of any books, papers and records and circumvention of the Fourth and Fifth Amendments by alleging their use as the manner or means of the commission of the alleged offense. Thus any book, paper or record innocent of itself would thereafter become the instrumentality of a crime.

It was never contended in the hearings on the Motions to Suppress the Evidence that Government's Exhibit 7 was an instrumentality of a crime nor does the record as finally presented in this entire case show that it ever was the instrumentality of a crime.[2]

Books and Records Lawfully Kept

As to the books and records lawfully kept in pursuance to the contract, it was never heretofore contended in the Trial Court below that these were instrumentalities of crime but rather that they were evidence which it was necessary for the bookkeeper and auditor to consider and for evidence to be introduced in Court in the trial of this action.

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[2] If the court goes beyond the contentions in the trial court on the motions to suppress the evidence and the affidavits pro and con and the court's ruling and examines the entire record it will see that it was never used as an instrumentality of crime. The gravamen of the charge of count V is that the check was presented to Byars. Nowhere in the record is there any evidence that a cancelled check for $4,000 endorsed by William H. McAvoy was ever presented to the said *Cost Inspector* (Byars), in support of said *statement*. Byars did not so testify. Zap denied it. If there is any such evidence in the record we have failed to find it anywhere in the testimony of Hilton Byars who would be the person who would have to testify to that fact.

Zap testified that the flight test and insurance took between $4,587.64 to $4,787.64 either spent or incurred (R. 613). This was not denied by the government.

Zap further testified he never made any statement or representation to Hilton Byars. He never asked or said anything to Hilton Byars (R. 615). This is undenied by Byars.

The check itself was an unoffending paper such as those described in the Lefkowitz case.

Respondent's papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were.

Gouled v. *U. S.*, 255 U. S. 298;
U. S. v. *Lefkowitz*, 285 U. S. 452;
Takahashi v. *U. S.*, 143 F. (2) 118.

The Government says that there was a prior inspection of the F. B. I. made pursuant to the contract. This is erroneous.

The contract provides that:

> "The contractor obligates himself to set up a separate record of costs against this contract for subsequent consideration and inspection by authorized representatives of the Navy Department (Bureau of Supplies and Accounts)" (Govt. Exhibit 3, page 7).

Furthermore the contract provides for the greatest secrecy and penalizes the contractor even to the extent of forfeiture of his contract for failure to maintain such secrecy, and opens him to criminal prosecution if secrecy is not maintained. Contract, pages 8 and 12.

The Contract must be read in the light of the statutory provisions. Section 3101 of Title 10, U. S. Code, as amended by the Second War Powers Act and Executive Order 9127.

Both of these provisions provide for Administrative Inspection by a particular department of the Navy pursuant to the statutory provisions. All others, by the terms of the statute and executive orders are forbidden. And the Statute itself (Section 1301 of the Second War Powers Act (Title 50, Supp. IV, Section 643a) provides for the guarantee of

the Fifth Amendment by providing for complete immunity upon claiming the privilege for any document or thing required to be produced pursuant to the administrative order. This shows clear congressional intent to safeguard contractors rights under the Fourth and Fifth Amendments.

Wigmore (3rd Edition, 1940), Section 2377, says:

> "• • • many situations exist where the information can best be obtained only from the person himself whose affairs are desired to be known by the Government. An attempt to do so by mere compulsion might be tedious and ineffective. And where the ultimate purpose is administrative, and not penal, it may well be that the Government can afford to promise secrecy in respect to purposes penal or litigious as the price of readily achieving its administrative purpose when it demands a report of the truth. It is some such principle that justifies the modern creation of a number of privileges, all statutory in origin, carrying sundry matters required by law to be reported to some *administrative* official."

Congress by statute gave defense contractor's books and records privacy, secrecy and provided for statutory immunity pursuant to the guarantees of the Fifth Amendment, if produced.

Title 50, Section 643 a U. S. Code.

Element of Consent

During the oral argument the question was raised before this Court of whether there had at any time been any consent on the part of Zap to the inspection by an agent.

There never has been any contention on the part of the Government in this case that the defendant consented to the *search* and *seizure* of his books and records or their use in evidence against him. The Government has contended only that by the terms of his contract was there

an authority to inspect and from that claimed authority to inspect, they have expanded the claim to include (1) search, (2) seizure (forbidden by the Fourth Amendment), and (3) the use in evidence of the books and records so searched and seized (forbidden by the Fifth Amendment).

Boyd v. *U. S.*, 116 U. S. 616.

In the Trial Court, the petitioner expressly set out in his affidavit that he at no time consented to the searching or seizing of his books and records and that he did not authorize anyone to take any books, papers, records and documents from the said business and that at no time did he consent to the taking of said books, papers, records and documents and did not know of the taking of the books, papers, records and documents (R. 136, 137). That was undenied by the Government.

No claim of consent by employees was advanced there.

It also appears that various cost inspectors of the Navy protested to the F. B. I. agents that they had no authority to examine the books and records which were the confidential property of Edward F. Zap Aeronautical Engineer (R. 150, 158).

There never was any contention that Zap consented directly or indirectly to the taking of Exhibit 7 and he moved to suppress it in advance of trial and strike it during the trial on the grounds that it violated his constitutional rights under the Fourth and Fifth Amendments to the Constitution (R. 127, 132, 369, 370, 378). In none of the affidavits did the Government claim consent through employees.

There are various reasons why under no circumstances could there have been consent in this case.

(1) Since the contractor was governed by the express provisions of Title XIII of the Second War Powers Act

(50 U. S. C. App., Supp. IV, 643 and 643(a) and by Executive Orders 9127 and 8381, it was impossible for consent lawfully to be given the F. B. I. either by the contractor or his employees without directly violating the Statutes and Executive Orders and express terms of the contract relating to the persons who might be authorized to see his books and records and inspect the same and take them.

(2) Nor do we understand the law to be that even if there could be consent and waiver of a constitutional right that it could be made by anyone but the accused himself in a criminal case and upon a clear and convincing showing. This has been the rule in cases of waivers of consent of other constitutional rights such as the right of counsel (Sixth Amendment), the right to trial by a full jury (Seventh Amendment) and other fundamental and important constitutional rights.

The right of a person to refuse to incriminate himself is purely a personal privilege of the witness.

U. S. v. *White*, 322 U. S. 694;

If it is personal to the accused to claim it, it would appear that it must be personal to the accused to waive it.

And in any event proof of waiver must be clear, convincing, and certain, equal with waiver of right of counsel, or of one juror.

U. S. v. *White*, 322 U. S. 694;
Patton v. *U. S.*, 281 U. S. 276;
Powell v. *Alabama*, 287 U. S. 45;
Walker v. *Johnson*, 312 U. S. 275;
Dorsey v. *Gill*, 148 F. (2) 857.

Only where the accused competently and intelligently waives his right of counsel "with his eyes wide open" has he waived the constitutional right.

Walker v. *Johnson*, 312 U. S. 275.

It would seem that the Constitution afforded the same guarantees under the Fourth and Fifth Amendments and waivers should not be assumed or implied.

We have never understood that these important fundamental and constitutional rights could be waived in absentia by a clerk, a bookkeeper, a secretary or even an office manager. But if they could be, there was none in this case. The Government never contended in the Trial Court on the Motions to Suppress Evidence that there ever was consent through any manager or any other person.

In *Amos* v. *The United States*, 255 U. S. 313, 317, the Supreme Court said:

> "The contentions that the constitutional rights of defendant were waived when his wife admitted to his home the Government officers, who came, without warrant, demanding admission to make search of it under Government authority, cannot be entertained. We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that under the implied coercion here present, no such waiver was intended or effected."

(3) During the oral argument, there was a question raised about whether Stuart Eldridge Weaver, Jr., a young man and a comparatively new employee, having been employed on September 25, 1942, and remained so employed until November 6, 1942 (R. 397), had given any consent to an inspection by the F. B. I. This question was not before the trial court on the motion to suppress the evidence and was not offered by the Government. We do not think the Court should therefore consider it. But we meet the point in any event.

Assuming that Weaver could, by violating the statutory provisions above quoted, give authority to F. B. I. agents to come into the plant, the record does not bear out any

such state of affairs. Only a portion of the record in respect to him was read to the Court in the oral argument. A reexamination of the record shows that this argument proceeded upon erroneous assumptions of the record.

It appears from the record that after Zap left, Champlin was endeavoring to get Weaver and other employees inducted into the Military Service so that he might have a free hand. Champlin had been contact man with the draft board (R. 616). A particular sentence quoted to this Court in oral argument actually related to that matter. We give the testimony herewith (R. 400):

"By Mr. Lavine:

Q. Did Mr. Champlin and you have some difficulties over your draft status?

A. Slight difficulties, yes.

Q. Just state what occurred.

A. At my request, Mr. Champlin, shortly after Mr. Zap left, started to bring into the office the agents or representatives of the Government. Mr. Champlin made statements to me which I wanted to find out the truth of, which were derogatory to various employees, and derogatory to Mr. Zap.

Q. Did Mr. Champlin try to get you inducted into the service so you would no longer be manager of the Zap organization, after Mr. Zap installed you?

(Objection by the Government sustained)" (R. 400).

It will be seen from the above that the questions related to the draft status of Weaver and the record does not show what agents, whether they were persons connected with military draft matters or of the Navy Department or who they were. Certainly this evidence cannot be considered as a waiver by Zap through an agent of anything, much less of his right to be searched and his papers seized and used in evidence against him.

But Zap immediately upon his return November 6, 1942, notified the F. B. I. that they had no right to make searches and seizures in his plant and they told him to go home and have a Scotch and soda and continued under the authority of their position to do as they saw fit. The books and records and the papers which are objected to in this case were searched and seized December 1, long subsequent to the time (November 6, R. 397) that Weaver left the plant.

But if we, for the sake of argument, were to concede that Weaver or anyone else might permit persons to come into the plant, we still would be faced with their right to seize papers and take them away and thereafter use in evidence against the accused without any process. The authority to inspect, even if it exists, does not include the authority to search and seize as guaranteed by the Fourth Amendment and to use such evidence against a person as guaranteed by the Fifth Amendment.

Boyd v. *United States*, 116 U. S. 616;
Takahashi v. *United States*, 143 F. 2d, 118.
People v. *Richter* (New York), 265 App. Div. 767.

In the *Takahashi* case, the Statute permitted searches of persons at Immigration stations. Officers seized some papers from a Japanese and the Court there held that the authority to search did not grant the authority to seize papers and thereafter use them in evidence against the accused.

In this case, Zap not only promptly expressed his disapproval of any searches and seizures in his plant but objected in advance of trial to the use in evidence of these documents so searched and seized and carried away.

The record further discloses that Champlin, the faithless employee, had entered into a conspiracy with other employees to gain control of Zap's business. Zap left for Washington on October 18, 1942 (R. 138). Just after he

left, Mr. Champlin, in conspiracy with other employees, planned to gain control of Zap's plant and organization. Champlin conferred with other employees every day in the private office (R. 472). "Mr. Champlin told me, during the absence of Mr. Zap, that he intended to become the head of the Zap organization. He told me that was one of his aspirations." And Mr. Champlin told me "that he intended to become president of the Zap organization, the head of it." Testimony of Ethel Boyle (R. 473).

On October 27, Champlin was a party to a telephone call to Washington to see what arrangements could be made to take over the business of Mr. Zap (R. 501). He okayed the payment of a bill for this telephone call. He at no time notified Mr. Zap that he was about to be arrested. He also told various employees in the office that Mr. Zap was going to be arrested (R. 499), and he took a trip to San Diego to see the Navy Captain in Charge in San Diego (R. 500). Champlin told Miss Boyle he was going to send Zap to prison for 167 years (R. 553) and that he was going to be in charge of the Zap concern (R. 554). Champlin was controller in charge of books and particularly Government's Exhibits 34 to 45, which were later introduced in evidence (R. 481). Ethel Boyle, the bookkeeper, took orders from Champlin (R. 535).

On October 31, Champlin made an affidavit for a search warrant on behalf of the F. B. I. This affidavit was made on October 31, 1942 (R. 187-189). While this affidavit was on information and belief and faulty in many other respects the search under it was not used in evidence here. We mention the matter only to point out that Champlin on October 31 was already working with F. B. I. agents who were on notice of that fact.

Ordinarily, if there had been a mistake discovered by Navy personnel of a comparatively minor nature involving

whether the bill was $4,000 or whether $4,000 included the insurance and many items of expense (R. 305, 591) which had been incurred and which was contained in the estimate to the Navy for "flight test and insurance," would have been a matter for readjustment in the usual course of Navy procedure. The claim, made out October 16, 1942, probably had not even time to reach the Navy when the F. B. I agents came in "on their own responsibility."

The Navy, under its regulations, withheld from the contractor at all times at least a substantial percentage of the amount due him. Therefore, such a petty error, if one occurred, would have been a simple matter to have asked him about and readjusted. As a matter of fact, the contractor himself stated that between $4,587.64 and $4,787.64 had been incurred in the flight test and insurance which is considered a part of the flight test (R. 613) and this was undenied, but through Champlin and the F. B. I. agents working on this particular case, all this was prevented and through the unauthorized seizure of the documents here, the matter was rushed to a criminal trial.

The books and records, Exhibits 34 to 45, were used in an effort to show that this amount had not yet been paid out for the insurance and as part of flight test expense (although it was incurred), and the books and records were sent to the Jury Room when the Jury retired (R. 719). Thus, these books and records unlawfully searched and seized were important evidence used against the petitioner.

Conclusion

In this case we have an important figure in the Aviation world through whose private office and private safe F. B. I. agents went indiscriminately in quest of evidence and to build a case if they could by illegal search and seizure and there after these books and records were all introduced in

evidence against the defendant over timely motions to suppress the evidence and other objections.

It is respectfully submitted that as fundamental rights under the Fourth and Fifth Amendments were violated in the use in evidence of these books, records and papers searched and seized without any lawful search warrant, that in accordance with the well known doctrines established by this Court in enforcing the Constitutional mandates of the Fourth and Fifth Amendments, that the judgments should be reversed and that the evidence unlawfully searched and seized should be ordered suppressed in evidence and ordered returned to the defendant.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Appellant.

NOTE: Many of the books and records included within Exhibits 34 to 45 are still with the office of the Clerk in Los Angeles, should the Court desire to see them. It was stipulated that they could be sent in original form to this court and if the Court should desire to see other than the description set forth, the Clerk will no doubt forward them to the Court (R. 91 to 94).

APPENDIX

The following statutes and executive orders supplement the appellant's appendix in the opening brief.

Title XIII, Second War Powers Act

643(a). Oaths and affirmations; attendance and testimony of witnesses; production of records and other evidence; unlawful disclosure of information obtained.

For the purpose of obtaining any information or making any inspection pursuant to Section 1301, any agency acting hereunder, or the Chairman of the War Production Board, as the case may be, may administer oaths and affirmations and may require by subpoena otherwise the attendance and testimony of witnesses and the production of any books or records or any other documentary or physical evidence which may be demed relevant to the inquiry. Such atendance and testimony of witnesses and the production of such books, records, or other documentary or physical evidence may be required at any designated place from any State, Territory or other place subject to the jurisdiction of the United States: *Provided*, that the production of a person's books, records, or other documentary evidence shall not be required at any place other than the place where such person resides or transacts business, if, prior to the return date specified in the subpoena issued with respect thereto, such person furnishes such agency or the Chairman of the War Production Board, as the case may be, with a true copy of such books, records, or other documentary evidence (certified by such person under oath to be a true and correct copy) or enters into a stipulation with such agency or the Chairman of the War Production Board, as the case may be, as to the information contained in such books, records, or other documentary evidence. Witnesses shall be paid the same fees in mileage that are paid witnesses in the courts of the United States. No person shall be excused from attending and testifying or from producing any books, records, or other documentary evidence or certified copies thereof or physical evidence in

obedience to any such subpoena, or in action or proceeding which may be instituted under this section, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be subject to prosecution and punishment or to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that any such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. Such agency or the Chairman of the War Production Board shall not publish or disclose any information obtained under this title which such agency or the Chairman of the War Production Board deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless such agency or the chairman of the War Production Board determines that the withholding thereof is contrary to the interests of the National Defense and Security; and anyone violating this provision shall be guilty of a felony, and upon conviction thereof, shall be guilty of a felony, and upon conviction thereof ceeding two years, or both. March 27, 1942, 3 P. M., E. W. T., C. 199, Title XIII, Section 1302, 56 Stat. 185.

Executive Order No. 8381 (5 F. R. 1147)

Whereas, Section 1 of the Act of January 12, 1938, 52 Stat. 3, Title 50, Section 45 provides: • • •

Now therefore, by virtue of the authority vested in me by the foregoing statutory provisions, and in effectuation of the purposes of the said Act of January 12, 1939, I hereby define the following as vital military and naval installations or equipment requiring protection against the general dissemination of information relative thereto.

1. All military or naval installations and equipment which are now classified, designated and marked, under the authority or at the direction of the Secretary of War or the Secretary of the Navy as "secret," "confidential,"

or "restricted," and all military or naval installations and equipment which may hereafter be so classified, designated, and marked with the approval or at the direction of the President and located within * * *

* * * * * * * *

(f). Any commercial establishment engaged in the development or manufacture of military or naval arms, munitions, equipment, engines, ships or vessels for the United States Army or Navy; all military or naval aircraft, weapons, ammunition, vehicles, ships, vessels, instruments, engines, manufacturing machinery, tools, devices, or any other equipment, whatsoever, in the possession of the Army or Navy, or in the course of the experimentation, development, manufacture, or delivery for the Army or Navy which are now classified, designated and marked under the authority or at the direction of the Secretary of the War or the Secretary of the Navy as "secret," "confidential," or "restricted," and all such articles, materials or equipment which may hereafter be so classified, designated and marked with the approval or at the direction of the President.

3. All official military or naval books, pamphlets, documents, reports, maps, charts, plans, designs, models, drawings, photographs, contracts and specifications, which are now marked under the authority or at the direction of the Secretary of War or the Secretary of the Navy as "secret," "confidential," or "restricted" and all such articles or equipment which may hereafter be so marked with the approval or at the direction of the President.

FRANKLIN D. ROOSEVELT.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 489

EDWARD F. ZAP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 805–807) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 4, 1945 (R. 808), and a petition for rehearing was denied on September 13, 1945 (R. 809). The petition for a writ of certiorari was filed on October 8, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and

XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether books and records relating to petitioner's contract with the Navy Department were inadmissible as evidence at his trial.

2. Whether the indictment is sufficiently definite and certain.

3. Whether petitioner's plea in abatement based on the absence of women from the grand jury was properly overruled.

4. Whether petitioner was deprived of an opportunity to prepare his defense because certain records were removed to a vault for protection by the Navy Department.

5. Whether the fact that petitioner did not hear a discussion among counsel at the bench which resulted in the dismissal of a juror by consent constituted a deprivation of his right to be present at all stages of the trial.

6. Whether the evidence was sufficient to support the verdict.

7. Whether the trial judge properly instructed the jury on the nature of the offense and the requisite intent.

8. Whether the circuit court of appeals abused its discretion in denying petitioner's motion for a remand of the case to the district court in order to enable him to move for a new trial.

STATUTE INVOLVED

Section 35 (A) of the Criminal Code (18 U. S. C. 80) provides:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

Petitioner was convicted on Counts 1, 4, and 5 of an indictment returned against him and Lieutenant Commander Lloyd Scott in the United States District Court for the Southern District of California (R. 2–25, 60–61, 62, 730–731).[1] On appeal to the Circuit Court of Appeals for the Ninth Circuit, the Government consented to a reversal of the conviction on the first count on the ground that the indictment was not sufficiently definite and certain to apprise petitioner of the crime charged (R. 805). The circuit court of appeals affirmed the judgment on Counts 4 and 5, by which petitioner was sentenced to imprisonment for nine months on each count, the sentences to run concurrently, and to pay a fine of $2,000 on each count (R. 67–69, 808).

Count 4 charged that, on or about October 16, 1942, the defendants unlawfully presented to the disbursing officer, Bureau of Supplies and Accounts, United States Navy, a claim for payment which was known to be false in that the claim was for $4,000 allegedly paid to William H. McAvoy for services as a test pilot, whereas McAvoy had in fact been paid only $2,375 (R. 8–9). Count 5 charged that defendants unlawfully concealed a material fact and made a false representation in a matter within the juris-

[1] The court directed a verdict of acquittal as to Scott (R. 61).

diction of the United States Navy by representing to Hilton Byars, the Navy cost inspector, that $4,000 had been paid to McAvoy and presenting to Byars a cancelled check to McAvoy's order for that sum, whereas, at defendants' request, the check had been endorsed by McAvoy in blank and defendants had filled in the figure of $4,000 and received the proceeds of such check, paying McAvoy only $2,375 (R. 9–11).

The evidence for the Government on these counts may be summarized as follows:

Petitioner entered into a contract with the Navy Department (No. 83142) under which he was to do experimental work on airplane wings, being paid in part on a cost plus fixed fee basis (Gov. Ex. 3, R. 282–284). In January 1942, in a letter to the resident inspector of naval aircraft, petitioner called attention to the fact that no provision had been made for preliminary flight demonstrations, and submitted an estimate of the cost of such test flights (R. 284–287; Gov. Ex. 49, R. 482–484). In June 1942, the Navy Department approved a modification of the contract to provide for test flights, payment to be made at cost plus a fixed fee (R. 288–289). In his estimate of the probable cost of the test flights, petitioner listed the cost of a test pilot's fee and insurance at $4,000 (R. 483). At that time, he had already agreed to pay test pilot McAvoy between $2,000 and $2,500 for making the tests (R. 639).

McAvoy did make test flights at Hughes Field and, from September 25 to October 5, at Daggett Field, California (R. 306–308). McAvoy originally testified that petitioner paid him $2,075 by check and $300 in cash (R. 302–304). On cross-examination he was shown another check to his order, dated October 4, 1942, in the sum of $200, and acknowledged the endorsement on the check as his (R. 309–310). Petitioner testified that $50 in petty cash had also been paid to McAvoy (R. 607). On October 6, 1942, McAvoy signed a receipt for the $300 received in cash as payment for excess time in flight testing (Gov. Ex. 5, R. 302–303), and on October 11, 1942, he signed a statement acknowledging "final payment in full" for his test flight services without specifying the amount received (Gov. Ex. 6, R. 303–304).

A day or two before they went to Daggett Field for the test flights, petitioner asked McAvoy to endorse a blank check, telling him that the check was to be used to cover the general expenses of the trip. McAvoy endorsed the check and returned it to petitioner. (R. 300–302.) Petitioner's bookkeeper, Ethel Boyle, had given the check to Thomas C. Browne, petitioner's auditor, on September 23; it was blank except for the date typed on the check (R. 466). On October 13, petitioner gave it back to Miss Boyle still blank, except for the date, McAvoy's endorse-

ment, and petitioner's signature, and told her to fill it in (R. 466). Browne instructed her to fill in McAvoy's name as payee and $4,000 as the amount (R. 466–468, 554–555). The check was then deposited in petitioner's account (R. 466, 555). It was posted in petitioner's books of account as a payment to McAvoy (R. 429–430, 453).

In October 1942, petitioner presented to the Navy Department a voucher for "work on a cost plus fixed a fee basis under contract No. 83142," which listed "Other Direct Charges—$4,300" (Gov. Ex. 19, R. 362–363).[2] Supporting the claim was a document bearing petitioner's signature in which he certified that he had paid $4,000 to McAvoy by "check, 4679, dated 9-23-42" (R. 363), that being the number and date of the check endorsed by McAvoy in blank (R. 301; Gov. Ex. 7, R. 316). Another voucher for per diem expenses in connection with the test flights at Daggett Field was supported by a certificate signed by petitioner in which per diem expenses for McAvoy were separately listed (Gov. Ex. 19, R. 363–364). Hilton Byars, the Navy cost inspector who audited petitioner's books (R. 503),

[2] The Navy cost inspector, Hilton Byars, testified that as petitioner accumulated costs he would notify the inspector. After a preliminary audit had been conducted, the voucher would be prepared by the Navy, forwarded to petitioner for signature, then signed by the cost inspector and forwarded to the disursing officer. (R. 291.)

testified that, in connection with his audit of the claims on Contract No. 83142, he received the certification by petitioner of the $4,000 payment to McAvoy, and the receipts signed by McAvoy acknowledging payment of $300 in cash and "final payment" for his services (R. 516–517). Petitioner's claim for $4,300 for McAvoy's services and his claim for per diem expenses were paid by the Navy Department (R. 514).

ARGUMENT

1. Petitioner contends (Pet. 19, 24, 25, Br. 3–4, 7–31) that Government's Exhibit 7, the $4,000 check endorsed in blank by McAvoy (R. 316), and Government's Exhibits 34 to 45, petitioner's business records (R. 421–424, 426), were obtained as a result of an illegal search and seizure, and hence that the district court erred in denying petitioner's motion to suppress the evidence and in allowing the documents to be introduced at the trial. The facts on this issue, as developed in the affidavits submitted on petitioner's motion to suppress, are as follows:

On October 31, 1942, Harry Champlin, employed by petitioner as comptroller, made an affidavit in which he stated that he had seen checks indicating regular payments by petitioner to his co-defendant Lieutenant Commander Lloyd Scott, the resident inspector of naval aircraft (R. 187–189). On the basis of this affidavit and one by Murray Myerson, an F. B. I. agent (R. 183–184),

a search warrant was issued on October 31, 1942, authorizing the search of apartments 6 and 12 at 10976 Wilshire Boulevard, West Los Angeles, California, petitioner's living quarters (R. 184–186). Pursuant to this search warrant, one book of check stubs and six checks were seized (R. 186). When petitioner made his motion to suppress, it was discovered that his address, which was the place searched, was 10974½ Wilshire Boulevard (R. 196–197), and the Government consented to the entry of an order suppressing the evidence on the ground that the description of the premises was insufficient (R. 190, 203–204).

On the basis of Champlin's and Myerson's affidavits, another warrant was obtained on October 31, 1942, for a search of petitioner's offices at 1005 Broxton Avenue (R. 179–182). Two books of check stubs were seized (R. 183), but were not used at the trial.

From October 20 to December 1, 1942, two F. B. I. agents, Myerson and Sloane, acting under the auspices and by the authority of a senior accountant and a cost inspector of the Navy, conducted an audit of petitioner's books and records at his place of business during business hours (R. 192–195). The affidavit of Miss Boyle, petitioner's bookkeeper, submitted by petitioner on his motion to suppress, indicates that she cooperated with the agents by supplying records and furnishing requested information (R. 154–

155). During the course of that investigation, Myerson discovered the $4,000 check to test pilot McAvoy (Gov. Ex. 7) and asked the bookkeeper for the check, which Myerson then kept in his possession (R. 155). On December 1, 1942, Myerson applied for a search warrant of the business premises, stating in his affidavit that he had been on the premises by reason of a previous search warrant and had observed certain books and records, which he identified (R. 177–179). On the basis of this affidavit, a search warrant was issued on the same day and checks and records were seized (R. 174–177). Government's Exhibit 7, the $4,000 check, is not specifically mentioned in the return, but the request for the warrant, and the warrant itself, referred to all cancelled checks of the company and of petitioner personally (R. 175, 178). The return covered the March to November 1942 cancelled checks (R. 177), which would include Government's Exhibit 7 (R. 317).

In his motion to suppress, petitioner alleged that, prior to the issuance of the first warrants on October 31, while he and his wife were out of town, his apartment had been searched (R. 129–130, 136–137); that the search warrants of October 31 were based on insufficient affidavits (R. 130–131); that the examination of his records during the month of November was illegal (R. 131–132, 137–138, 147–150), and that the latest search warrant of December 1 was issued

on the basis of an insufficent affidavit (R. 131–132). At the argument on the motion, he made a request for leave to take oral testimony of Myerson, which was denied (R. 237–238). After the close of the argument, petitioner filed a written offer of proof in which he stated that Myerson, if called as a witness, would have testified that on October 20, before the issuance of the first warrant, he had searched petitioner's apartment, and that the examination of the books and records at petitioner's premises during the month of November 1942, was not made pursuant to a search warrant (R. 163–167). The district judge denied the motion to suppress, except as to the checks taken from petitioner's apartment (R. 203–204). At the trial, petitioner objected to the introduction of evidence seized pursuant to the search warrant of December 1, and again sought to take the testimony of Myerson (R. 369, 380). He did not object to the introduction of Government's Exhibit 7 (R. 316), but subsequently moved to have the exhibit stricken on the ground that it was illegally obtained (R. 379–380).

Since the evidence obtained under the search warrants of October 31 was not used at the trial, questions raised by petitioner as to their validity (Br. 15) are immaterial.[3] As to the records intro-

[3] For this reason it is unnecessary to consider petitioner's contention (Pet. 19, 25–26, Br. 19–22) that the district court erred in denying his request to take the oral testimony of Myerson on the motion to suppress. The "offer of proof"

duced against petitioner, the significant facts are that F. B. I. agents, acting under the authority of the Navy, conducted an audit of petitioner's books; that in the course of that examination they kept possession of Exhibit 7 (the $4,000 check to test pilot McAvoy); and, at the close of their investigation, obtained a search warrant for petitioner's books and records on the basis of an affidavit, which we concede to be technically deficient in that it failed to set forth grounds for believing that petitioner had committed an offense.

We think there can be no question of the propriety of the audit of petitioner's books and records. The right of inspection is specifically accorded by statute (10 U. S. C. 310 (*l*) and 50 U. S. C. App., Supp. IV, 643), and by the terms of petitioner's contract with the Navy Department (Gov. Ex. 3), which provided:

> The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government.

Petitioner's records were thus quasi-public documents, and their inspection and the use of the evi-

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filed by petitioner shows that he wished to question Myerson as to an alleged search of petitioner's apartment on October 20 for the evidence which was suppressed (R. 164–165), and that he wished to show that Myerson took the $4,000 check during his examination of petitioner's books (R. 166), a fact which is not denied.

dence obtained thereby violated none of petitioner's constitutional rights. *Wilson* v. *United States*, 221 U. S. 361, 380; *Bowles* v. *Glick Bros. Lumber Co.*, 146 F. 2d 566, 571 (C. C. A. 9); *Bowles* v. *Beatrice Creamery Co.*, 146 F. 2d 774, 779 (C. C. A. 10); *Rodgers* v. *United States*, 138 F. 2d 992, 995–996 (C. C. A. 6); *Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384, 388–392 (C. C. A. 7), certiorari denied, 311 U. S. 690; *Bowles* v. *Stitzinger*, 59 F. Supp. 94 (W. D. Pa.).[4]

Petitioner argues (Pet. 19, 21, 24, Br. 30–31) that F. B. I. agents were not authorized to conduct the audit under Executive Order 9127 (see Appendix to the Petition, pp. 7–9), whereby the President designated certain agencies to exercise the power of inspection conferred by Title XIII of the Second War Powers Act (50 U. S. C. App., Supp. IV, 643). However, the F. B. I. agents were acting under the auspices and by the authority of the Navy Department, one of the departments designated in the Executive Order, and, we submit, petitioner cannot question the authority of the Navy to use such personnel as it chose. Moreover, by his contract, petitioner agreed to keep his records "open at all times to the Government and its representatives" (Gov. Ex. 3, R. 282–284).

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[4] If inspection had been resisted, the Government would have been required to resort to court order in order to obtain the documents, but the affidavit of petitioner's bookkeeper establishes that she cooperated with the agents (see *supra*, p. 2).

Since the examination of petitioner's records was proper, the technical invalidity of the affidavit by which the search warrant of December 1 was obtained does not, we submit, render the documents inadmissible in evidence. There is authority to the effect that, where an inspection of quasi-public documents reveals the commission of a crime, the documents may be seized without a warrant. *United States* v. *Rabicoff*, 55 F. Supp. 88 (W. D. Mo.); see also *A. Guckenheimer & Bros. Co.* v. *United States*, 3 F. 2d 786, 789 (C. C. A. 3), certiorari denied, 268 U. S. 688; *United States* v. *Sherry*, 294 Fed. 684, 686 (N. D. Ill.). Certainly it would seem that instrumentalities of the crime may be so seized (cf. *In re 14 East 17th Street*, 65 F. 2d 289, 291 (C. C. A. 2)), just as they may be seized without warrant pursuant to a lawful arrest. *Marron* v. *United States*, 275 U. S. 192, 199; *Agnello* v. *United States*, 269 U. S. 20, 30. In this view, no warrant was required for the seizure of the records in question, for, contrary to petitioner's contention (Br. 17–18), the $4,000 check and the books of account in which that check was reflected were clearly the means by which petitioner concealed and covered up his fraud upon the Navy Department.[5] But, even if

[5] The decision in *Takahashi* v. *United States*, 143 F. 2d 118 (C. C. A. 9), on which petitioner relies (Br. 17, 25), is not in point, for there documents seized during a lawful search of petitioner's person were suppressed on the ground that they were merely evidence and not instrumentalities of a crime. Furthermore, the documents were not quasi-public.

proper procedure requires that possession of the quasi-public documents be obtained by means of a valid warrant, the deficiency in the affidavit by which the warrant was secured was merely a procedural irregularity, and not the kind of misconduct which would bar the Government from using the evidence. Since the inspection was lawful, the persons making the inspection could testify to the facts they found, and, since the documents were quasi-public, their production at the trial could be required by subpoena under the authorities cited *supra*, p. 13. The technical deficiency in the procedure by which the documents were produced in court could not, therefore, have prejudiced petitioner, and does not, we submit, invalidate relevant evidence obtained without infringing petitioner's right of privacy under the Fourth Amendment or privilege against self-incrimination under the Fifth.[5]

2. There is no merit in petitioner's attack on the indictment on the ground that the allegations of Counts 4 and 5 are too indefinite to state offenses (Pet. 20, 24, Br. 32–45). Count 4 specified the amount of the claim, the date and place of its presentation, the officer to whom it was presented, and the nature of the falsity. Count

[5] Since the use of the evidence was proper, there is no occasion to consider whether, as petitioner claims (Pet. 19–20, Br. 25), the district court erred in denying his motion to investigate the grand jury minutes to determine whether the indictment was based on illegally secured evidence.

set forth in detail the nature of the trick, device, etc., employed by petitioner, *i. e.*, the endorsement of a blank check by McAvoy, the subsequent completion of the check in the sum of $4,000, and the cashing of the check by petitioner (R. 10–11). Both counts, therefore, met the test by which their validity must be judged; they informed petitioner of the nature of the offense, and barred future prosecution on the same charge. *Glasser* v. *United States,* 315 U. S. 60, 66; *Hagner* v. *United States,* 285 U. S. 427, 431; *Roberts* v. *United States,* 137 F. 2d 412, 414 (C. C. A. 4), certiorari denied, 320 U. S. 768; *Bersio* v. *United States,* 124 F. 2d 310, 314 (C. C. A. 4), certiorari denied, 316 U. S. 665; *United States* v. *Goldsmith,* 108 F. 2d 917, 921 (C. C. A. 2), certiorari denied, 309 U. S. 678. Contrary to petitioner's contention (Br. 35–40), it is not required that an indictment under Section 35 (A) of the Criminal Code (*supra,* p. 3) set forth a false claim in *haec verba. Summers* v. *United States,* 11 F. 2d 583, 584 (C. C. A. 4), certiorari denied, 271 U. S. 681; *Bridgeman* v. *United States,* 140 Fed. 577, 586 (C. C. A. 9).[1]

3. Petitioner's plea in abatement, based on the absence of women from the grand jury (R. 210–

[1] Petitioner's contention (Pet. 20, 26, Br. 46–48) that it was error to deny his motion for a bill of particulars (R. 110–120) raises no question for review. It is well established that the granting of such a motion is in the discretion of the trial court. *Wong Tai* v. *United States,* 273 U. S. 77, 82; *Dunlop* v. *United States,* 165 U. S. 486, 491.

212; see Pet. 20–21, 25, Br. 49–50), was properly overruled. There is no assertion that persons of petitioner's race or creed were excluded from the grand jury, and he has shown no prejudice resulting from the exclusion of women. *United States* v. *Pelley,* 132 F. 2d 170, 180 (C. C. A. 7), certiorari denied, 318 U. S. 764; *Wuichet* v. *United States,* 8 F. 2d 561, 562 (C. C. A. 6); *United States* v. *Ballard,* 35 F. Supp. 105 (S. D. Cal.).

4. After the return of the indictment, petitioner filed a motion, addressed to certain Navy officers and to Government counsel, by which he sought the return of papers taken by the Navy after his arrest (R. 121, 205–207). Attached to the notice of motion was a copy of a letter written to a judge of the district court by Commander Smith of the Navy, in which the latter stated that Government property and petitioner's records had been moved to a fire-proof vault for protection, and that any part of the material would be released on order of the court (R. 124–125). Petitioner alleged generally that he needed the records for his defense, but did not specify the records which he sought (R. 122, 124, 126). On January 2, 1943, the motion was denied by the court on the grounds that it had no jurisdiction over the Navy Department (R. 32). On April 6, the opening day of the trial, petitioner filed an "objection to the jurisdiction of the court" on the ground that he had been denied due process of law because the records had not been returned to him (R. 212–213). In his affi-

davit annexed to the motion, petitioner admitted that he and his counsel had examined the records in the storage vault, but stated that the facilities were inconvenient (R. 214). After the trial opened, petitioner's counsel asked for a continuance on the ground that he had not had sufficient time to examine the records in the vault (R. 244). During the course of that argument, petitioner's counsel admitted that he had had full access to papers in the hands of Government counsel which had been taken under the search warrants (R. 254), but stated that he needed custody of the papers in the vault (R. 246, 254–255). After a conference of counsel, the documents requested by petitioner were produced in court, and the court granted petitioner's counsel the right to reserve cross-examination of witnesses until after the documents were examined (R. 260–261, 273).

Petitioner contends (Pet. 21, 25–26, Br. 50) that he was deprived of necessary material to prepare his defense, but he fails to specify the nature of the prejudice he claims. It is clear that he was given access to the documents before trial, and that he had ample time to examine them after they were produced in court. Moreover, from statements made by petitioner's counsel when granted the right to reserve cross-examination (R. 261), and from petitioner's motion in arrest of judgment (R. 221), it appears that the records in the vault related to wind-tunnel tests, a matter in-

volved in the first count in the indictment on which petitioner's conviction was reversed.

5. After the jury had been selected, one juror was observed to approach petitioner's co-defendant Scott and to engage in conversation with him. This was called to the attention of the trial judge, and, after a discussion among counsel at the bench, the juror was excused with the consent of all sides (R. 260–272). The discussion at the bench was in the presence, but out of the hearing, of petitioner (R. 261). No objection to the procedure was made at the time, but petitioner now urges (Pet. 20, Br. 51–54) that it was a deprivation of his right to be present at all stages of the trial. It is, however, established that the common practice of having conferences of counsel at the bench during the course of a trial does not violate a defendant's constitutional rights. *Steiner* v. *United States*, 134 F. 2d 931, 935 (C. C. A. 5), certiorari denied, 319 U. S. 774; cf. *Johnson* v. *United States*, 318 U. S. 189, 201.

6. Petitioner attacks the sufficiency of the evidence on various grounds:

a. The voucher, prepared by a Navy inspector for petitioner's signature (see fn. 2, p. 7, *supra*), listed the payment to McAvoy as "Other Direct Charges --- $4,300." (Gov. Ex. 19, see Br. 55). Petitioner urges (Pet. 21, Br. 55–56) there was therefore no evidence that, as charged in Count IV, he made a false claim for $4,000 "for

expenses incurred * * * in paying William H. McAvoy for services" (R. 8–9). Petitioner's books and the certificate supporting the voucher indicate clearly, however, that the claim was understood to be and was in fact a claim for reimbursement of money allegedly paid to McAvoy.

b. He also claims (Br. 56) a fatal variance in that the indictment charged a claim for $4,000, whereas the voucher represented a claim for $4,300. The evidence shows that petitioner paid McAvoy $300 in cash for which McAvoy gave petitioner a receipt, and the validity of that much of the claim is not questioned. In any event, the variance was clearly an immaterial one which did not prejudice petitioner's substantial rights. *Berger* v. *United States*, 295 U. S. 78, 82; Section 269 of the Judicial Code (28 U. S. C. 391).

c. As to Count 5, petitioner asserts (Pet. 21–22, Br. 56–58) that there was no evidence that, as charged in that count, he stated to Byars, the Navy cost inspector, that he had paid $4,000 to McAvoy, or that he presented the check for $4,000 to Byars. However, Byars testified that he examined petitioner's books reflecting the $4,000 payment, and received the certificates supporting the voucher in question by which petitioner certified that he had paid $4,000 to McAvoy (R. 515–517). Byars also identified Government's Exhibit 7, the $4,000 check, as representing the $4,000 item listed on petitioner's books (R. 515), thus

indicating that Byars had seen the check. Manifestly it was not necessary to prove that petitioner had made the representation orally or that he had personally shown the check to Byars.

d. Finally, petitioner contends (Pet. 22, Br. 59–61) that there was no proof of guilty knowledge on his part since his bookkeeper testified that his auditor Browne, rather than petitioner, had told her to fill in the check for $4,000. However, there was evidence that petitioner originally gave an estimate of $4,000 as the cost of the test pilot's fee and insurance when he had already agreed to pay McAvoy about $2,000; that he, himself, asked McAvoy to endorse the check in blank; that he gave the check to the bookkeeper to be filled in; that Browne testified that the check was not entered in September, when it was dated, because "we didn't have the amount of the check" (R. 430); that petitioner signed the voucher for $4,300, which was supported by a certificate signed by him that he had paid $4,000 to McAvoy (see Statement *supra*, pp. 5–8). This evidence warranted the jury in inferring that petitioner knew of and actively participated in the plan to defraud the Navy Department.[8]

[8] It is obvious that the directed verdict of acquittal as to Scott did not, as petitioner argues (Br. 62–63), require the exoneration of petitioner on the substantive charges. The crimes charged in Counts 4 and 5 (R. 8–11) can be committed by one person. Similarly, the direction to the jury to disregard Scott's name in the indictment (R. 669, 670; see Br.

7. Petitioner's various objections to the judge's charge are without merit.

a. Petitioner states (Pet. 22, 26, Br. 66–71) that the trial judge failed properly to instruct the jury concerning the applicable statute (*supra*, p. 3), that he did not read the statute and explain each significant term thereof. However, the judge read the indictment (R. 668–683) and instructed the jury very fully on the question of intent (R. 686–689), telling them that it was no offense to make a false claim against the United State unless the person making it understood that it was false and intended to defraud the Government (R. 687–688). The jury were thus fully instructed on the essential elements of the crimes charged. The failure of the judge to define a claim (see Br. 77) clearly did not prejudice petitioner since it is undisputed that a claim had been submitted to the Navy Department and had been paid.

b. After instructing the jury in many different ways that petitioner could be found guilty only if he willfully and deliberately presented a false claim; that he was not guilty if he acted in good faith even though he may have been mistaken (R. 686–687); that the person making the claim must know it to be false (R. 687–688); that he must have presented the claim "with a conscious

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64–65) did not constitute an amendment of the indictment. Cf. *Salinger* v. *United States*, 272 U. S. 542, 549; *Ford* v. *United States*, 273 U. S. 593, 602; *Dealy* v. *United States*, 152 U. S. 539, 542.

knowledge that it was not true"; that "to do a thing wilfully is to do it by design, with set purpose"; that the jury must find that petitioner willfully presented a false claim (R. 688); that there must be guilty knowledge and bad purpose (R. 689), the judge added (*ibid.*):

> You are instructed that the word "wilful" is used in the statute in this case, and means a thing done without ground for believing it to be lawful, or conduct marked by careless disregard as to whether or not the thing done is lawful.

Assuming, as petitioner contends (Pet. 22, 25, 26, Br. 71–74), that this particular sentence in the charge was not a proper definition of willful, as used in Section 35 (A) of the Criminal Code (*supra*, p. 3, the error was immaterial in view of the explicit reiterated instructions on intent which immediately preceded it. Cf. *United States* v. *J. Greenbaum & Sons*, 123 F. 2d 770, 773 (C. C. A. 2); *Clarke* v. *United States*, 132 F. 2d 538, 541 (C. C. A. 9), certiorari denied, 318 U. S. 789; Section 269 of the Judicial Code, 28 U. S. C. 391.

c. After instructing the jury on the factors to be considered in determining the credibility of witnesses generally (R. 684–686), the trial judge told the jury that in estimating petitioner's credibility it was proper to consider all of the matters he had suggested to aid their determination of

the credibility of the other witnesses, "including the interests that the defendant may have in the case, his hopes and fears and what he has to gain or lose as a result of your verdict" (R. 686). Petitioner's suggestion (Pet. 22, 26, Br. 74–77) that this constituted hostile comment is frivolous.

8. After petitioner's appeal had been noted, he moved in the circuit court of appeals for a remand of the case to the district court, in order to enable him to move for a new trial on the ground that the certificate (in Exhibit 19) attached to the $4,300 voucher, by which he represented that he had paid $4,000 to test pilot McAvoy, was a forgery (R. 776–778). At the trial, petitioner on cross-examination, had admitted his signature on the certificate, but had stated that he "suspect[ed] that signature was put on that paper for the stress department and somebody has used that paper" (R. 645–646). In his motion, petitioner alleged that he saw the document for the first time when it was presented to him on cross-examination (R. 780). He also submitted an affidavit by an examiner of questioned documents to the effect that, in his opinion, the typewritten line for the signature had been added after the ink signature (R. 784–791). The circuit court of appeals denied petitioner's motion for a remand (R. 802), and petitioner attacks that ruling (Pet. 23, 26, Br. 81–83).

Exhibit 19, containing the certificate, was introduced in evidence on April 9, a week before petitioner testified with respect thereto (R. 362, 780). The evidence offered as new in the circuit court of appeals added nothing to petitioner's testimony at the trial that he suspected that the paper had been "used" (R. 781); the expert's opinion that the typing had been added after the signature did not of itself tend to show that the claim was made without petitioner's knowledge. Petitioner admitted signing the voucher for $4,300; he admitted asking McAvoy to endorse a blank check; he admitted paying McAvoy only $2,625 (R. 600–603, 607). His explanation was not that he had failed to make a claim for $4,300, but that he had obligated himself for insurance in an amount which would have brought the total of the test pilot's fee and insurance to more than $4,000 (R. 604–606, 639–643).[9] The evidence which he offered was, therefore, not newly discovered and not of a character which was likely to have affected the result. Hence, there was no abuse of discretion on the part of the circuit court of appeals in denying petitioner's motion for a remand.

CONCLUSION

The judgment below is correct, and the case presents no conflict of decisions or question of

[9] Petitioner's books of account showed a payment of $135.00 for insurance of the test pilot (R. 453).

general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 489

EDWARD F. ZAP, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the circuit court of appeals (R. 805–807) is reported at 151 F. 2d 100.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 4, 1945 (R. 808), and a petition for rehearing was denied on September 13, 1945 (R. 809). The petition for a writ of certiorari was filed on October 8, 1945, and granted as to one of the questions presented on January 7, 1946. The jurisdiction of this Court is in-

voked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether certain of petitioner's books and records relating to his contract with the Navy Department were properly admitted in evidence at his trial for the offense of making a false claim against the Government, after having been obtained by the prosecuton as a result of a prior inspection of petitioner's books and records, made pursuant to the contract, which led to their seizure.

STATUTES INVOLVED

The statutes and executive order which are involved appear in the Appendix, *infra*.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of California on Counts 1, 4, and 5 of an indictment returned against him and Lieutenant Commander Lloyd Scott of the United States Navy (R. 2–25, 60–61, 62, 730–731).[1] On appeal to the Circuit Court of Appeals for the Ninth Circuit, the Government consented to a reversal of the conviction

[1] The court directed a verdict of acquittal as to Scott (R. 61).

on the first count on the ground that the indictment was not sufficiently definite and certain to apprise petitioner of the crime charged (R. 805). The circuit court of appeals affirmed the judgment on Counts 4 and 5, by which petitioner was sentenced to imprisonment for nine months on each count, the sentences to run concurrently, and to pay a fine of $2,000 on each count (R. 67–69, 808).

Count 4 charged that, on or about October 16, 1942, the defendants unlawfully presented to the disbursing officer, Bureau of Supplies and Accounts, United States Navy, a claim for payment which was known to be false in that the claim was for $4,000 allegedly paid to William H. McAvoy for services as a test pilot, whereas McAvoy had in fact been paid only $2,375 (R. 8–9). Count 5 charged that defendants unlawfully concealed a material fact and made a false representation in a matter within the jurisdiction of the United States Navy by representing to Hilton Byars, the Navy cost inspector, that $4,000 had been paid to McAvoy and presenting to Byars a cancelled check to McAvoy's order for that sum, whereas, at defendants' request, the check had been endorsed by McAvoy in blank and defendants had filled in the figure of $4,000 and received the proceeds of such check, paying McAvoy only $2,375 (R. 9–11).

The evidence for the Government on these counts may be summarized as follows:

Petitioner entered into a contract with the Navy Department (No. 83142) under which he was to do experimental work on airplane wings, being paid in part on a cost plus fixed fee basis (Gov. Ex. 3, R. 282–284). In January 1942, in a letter to the resident inspector of naval aircraft, petitioner called attention to the fact that no provision had been made for preliminary flight demonstrations and submitted an estimate of the cost of test flights (R. 284–287; Gov. Ex. 49, R. 482–484). In June 1942, the Navy Department approved a modification of the contract to provide for test flights, payment to be made at cost plus a fixed fee (R. 288–289). In his estimate of the probable cost of the flights, petitioner listed the cost of a test pilot's fee and insurance at $4,000 (R. 483). At that time, he had already agreed to pay test pilot McAvoy between $2,000 and $2,500 for making the tests (R. 639). McAvoy did make test flights (R. 306–308) and received approximately $2,500 from petitioner (R. 302–304, 309–310, 607). He signed a statement acknowledging "final payment in full" for his test flight services without specifying the amount received (Gov. Ex. 6, R. 303–304).

A day or two before petitioner and McAvoy went to Daggatt Field for the test flights, petitioner asked McAvoy to endorse a blank check, telling him that the check was to be used to cover the general expenses of the trip. McAvoy endorsed the check and returned it to petitioner (R. 300–

302). Petitioner's bookkeeper, Ethel Boyle, had given the check to Thomas C. Browne, petitioner's auditor, on September 23; it was blank except for the date typed on the check (R. 466). On October 13, petitioner gave it back to Miss Boyle still blank, except for the date, McAvoy's endorsement, and petitioner's signature, and told her to fill it in (R. 466). Browne instructed her to fill in McAvoy's name as payee and $4,000 as the amount (R. 466–468, 554–555). The check was then deposited in petitioner's account (R. 466, 555). It was posted in petitioner's books of account as a payment to McAvoy (R. 429–430, 453).

In October 1942, petitioner presented to the Navy Department a voucher for "work on a cost-plus-a-fixed-fee basis under contract No. 83142," which listed "Other Direct Charges—$4,300" (Gov. Ex. 19, R. 362–363). Supporting the claim was a document bearing petitioner's signature in which he certified that he had paid $4,000 to McAvoy by "check, 4679, dated 9-23-42" (R. 363), that being the number and date of the check endorsed by McAvoy in blank (R. 301; Gov. Ex. 7, R. 316).

This Court has limited certiorari to the question of whether books and records relating to petitioner's contract with the Navy Department [i. e., Gov. Ex. 7, the $4,000 check endorsed in blank by McAvoy (R. 316) and Gov. Exs. 34–45, petitioner's business records (R. 421–426)] were

properly admitted in evidence. The facts on this issue were developed in affidavits submitted on petitioner's motion to suppress, and so far as relevant to the issue here presented[2] are as follows:

From October 20 to December 1, 1942, two F. B. I. agents, Myerson and Sloane, conducted an audit of petitioner's books and records at his place of business during business hours under the auspices and by the authority of a senior accountant and a cost inspector of the Navy under whose jurisdiction petitioner's books and records had been placed for the purpose of inspection (R. 192–195). The affidavit of Miss Boyle, petitioner's bookkeeper, submitted by petitioner on his motion to suppress, indicates that she cooperated with the agents by supplying records and furnishing requested information (R. 154–155). Petitioner stated in his affidavit that on November 6, 1942, he protested to the agents that they had no right to examine his books (R. 148–149), but also stated that thereafter he saw the agents continue

[2] Petitioner's affidavits refer to two search warrants issued on October 31, 1942, one for the search of his apartment and one for the search of his business premises (R. 179–186; see R. 129–130, 136–137, 140–146). The Government consented to the entry of an order suppressing the evidence taken from petitioner's apartment on the ground that the address given in the warrant was incorrect (R. 190–203–204, see also R. 196–197). The evidence taken from petitioner's place of business under the warrant of October 31, 1942, was not used at the trial.

their examination with the assistance of his employees (R. 149–150). The books and records remained in the custody of the Navy during the investigation (R. 194–195). During the investigation, about November 5, 1942, Myerson asked the bookkeeper for the $4,000 check to test pilot McAvoy (Gov. Ex. 7). She showed him the check in the file and at his request gave it to him. (R. 155). On December 1, 1942, Myerson applied for a search warrant of the business premises, stating in his affidavit that he had been on the premises by reason of a previous search warrant and had observed certain books and records, which he identified (R. 177–179). On the basis of this affidavit, a search warrant was issued, and on the same day the specified checks and records were seized (R. 174–177). Government's Exhibit 7, the $4,000 check, is not specifically mentioned in the return, but the request for the warrant and the warrant itself refer to all cancelled checks of the company and of petitioner personally (R. 175, 178). The return covered cancelled checks for the period from March to November 1942 (R. 177), which includes the date of Government's Exhibit 7 (R. 317).[3]

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[3] In the petition (p. 7) and brief in opposition (p. 12), as in the Government's brief in the court below, it is stated that the check was retained by the F. B. I. agent to whom it was handed by the bookkeeper. This fact is not reflected in the record, which we have followed in the statement in the text. As will appear, we regard it as immaterial whether

The district judge denied the motion to suppress as to the records here involved (R. 203–204). At the trial, petitioner did not object to the introduction of Government's Exhibit 7 (R. 316) but subsequently moved to have the exhibit stricken on the ground that it was illegally obtained (R. 379–380). He objected to the introduction in evidence of his books and records, alleged to have been unlawfully seized (R. 419–421).

SUMMARY OF ARGUMENT

I

The inspection of petitioner's books and records was lawfully conducted without infringing his privilege against self-incrimination under the Fifth Amendment or his right to privacy under the Fourth. Since, by statute and by contract, petitioner was required to keep the books and records relating to his contract with the Navy Department open for inspection, the documents are not within the privilege against self-incrimination. There was no violation of the Fourth Amendment, for the inspection was peacably made with the consent of petitioner and his responsible employees. The F. B. I. agents who conducted the audit were acting under the juris-

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the check was retained by the investigator or seized pursuant to the search warrant; but if the difference should be regarded as significant we do not contend that the fact was otherwise than has heretofore been assumed.

diction and by the authority of officers of the Navy Department to whom the books and records were turned over for examination. Since there was no violation of petitioner's constitutional rights, information obtained from the records, and the records themselves if not unlawfully obtained, could properly be used against petitioner at the trial.

II

Although the search warrant by which physical possession of the records was obtained was defective in failing to set forth facts showing probable cause to believe that petitioner had committed an offense, the denial of petitioner's motion to suppress was proper. The exhibits which are here involved were the means by which petitioner both perpetrated and concealed his fraud upon the Navy Department and hence were instrumentalities of a crime. As such, they were subject to seizure upon being discovered in the course of an inspection which did not involve an invasion of petitioner's right to privacy. Consequently a warrant was unnecessary and defects in the one that was used are immaterial.

III

Even if a search warrant were necessary in order to obtain physical custody of the documents, the defect in the affidavit by which the warrant was obtained amounts to no more than a technical

error, since the deficiency in the warrant affected only the right to retain the physical custody of the documents and not the right to use the information obtained therefrom. The only relief to which petitioner would have been entitled on his motion to suppress would have been the return of the documents, not the suppression of evidence based upon them. Had the motion been granted, a second warrant could thereafter have been obtained, for the Government would not have been obliged to use information obtained by means of the defective warrant in swearing out a new one. The function of the warrant in this case was different from the usual one, since here the warrant was not the means of invading privacy but merely the means of obtaining for use in court documents which the prosecution was entitled to have and to use as evidence.

ARGUMENT

I

THE INSPECTION OF PETITIONER'S BOOKS AND RECORDS WAS PROPER AND INFORMATION OBTAINED THEREBY COULD PROPERLY BE USED IN EVIDENCE AGAINST HIM

Petitioner voluntarily entered into a contract with the Navy Department to perform certain services for the Government for which he was to be paid on the basis of cost plus a fixed fee. Congress has broad power to fix the terms and condi-

tions upon which the United States will enter into such contracts, *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. One of the conditions imposed by statute with respect to petitioner's contract (10 U. S. C. 310 (1) and 50 U. S. C. App., Supp. IV, sec. 643, *infra*, pp. 27–28) was that relevant books and records were to be open for government inspection. Petitioner accepted this condition by entering into the contract, and further expressly agreed to a clause which provided that—

> The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government. [Gov. Ex. 3, R. 282–284.]

We think it is clear that the privilege against self-incrimination conferred by the Fifth Amendment does not apply to the books and records here involved, all of which related to petitioner's contract with the Navy Department. There is a long line of cases to the effect that, where books and records are required by law to be kept, such documents are not within the privilege. See the cases collected in Wigmore, *Evidence* (3d ed., 1940, Sec. 2259c). This Court in *Boyd* v. *United States*, 116 U. S. 616, 623–624, distinguished in this connection records required by law to be kept and purely private papers. The same distinction was reiter-

ated in *Wilson* v. *United States*, 221 U. S. 361, 380,[4] and *Gouled* v. *United States*, 255 U. S. 298, 308, and has been enunciated in many lower court decisions. *Bowles* v. *Insel*, 148 F. 2d 91, 93 (C. C. A. 3); *Bowles* v. *Glick Bros. Lumber Co.*, 146 F. 2d 566, 571 (C. C. A. 9), certiorari denied, 325 U. S. 877; *Bowles* v. *Beatrice Creamery Co.*, 146 F. 2d 774, 779 (C. C. A. 10); *Cudmore* v. *Bowles*, 145 F. 2d 697 (App. D. C.), certiorari denied, 324 U. S. 841; *Rodgers* v. *United States*, 138 F. 2d 992, 995–996 (C. C. A. 6); *In re Sana Laboratories*, 115 F. 2d 717, 718 (C. C. A. 3), certiorari denied, 312 U. S.

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[4] This Court there said:

"But the physical custody of incriminating documents does not of itself protect the custodian against their compulsory production. The question still remains with respect to the nature of the documents and the capacity in which they are held. It may yet appear that they are of a character which subjects them to the scrutiny demanded and that the custodian has voluntarily assumed a duty which overrides his claim of privilege. This was clearly implied in the *Boyd Case* where the fact that the papers involved were the *private* papers of the claimant was constantly emphasized. Thus, in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction. * * * The principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulations and the enforcement of restrictions validly established. There the privilege, which exists as to private papers, cannot be maintained."

688; *Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384, 388–392 (C. C. A. 7), certiorari denied, 311 U. S. 690; *Bartlett Frazier Co.* v. *Hyde*, 65 F. 2d 350, 351–352 (C. C. A. 7), certiorari denied, 290 U. S. 654; *Spring Drug Co.* v. *United States*, 12 F. 2d 852, 857 (C. C. A. 8); *A. Guckenheimer & Bros. Co.* v. *United States*, 3 F. 2d 786, 789 (C. C. A. 3), certiorari denied, 268 U. S. 688; *United States* v. *Kempe*, 59 F. Supp. 905, 909 (N. D. Iowa); *Bowles* v. *Stitzinger*, 59 F. Supp. 94, 95 (W. D. Pa.); *United States* v. *Rabicoff*, 55 F. Supp. 88, 89 (W. D. Mo.); *Bowles* v. *Chew*, 53 F. Supp. 787, 790 (N. D. Cal.); *United States* v. *Sherry*, 294 Fed. 684 (N. D. Ill.); *United States* v. *Mulligan*, 268 Fed. 893 (N. D. N. Y.). The records here involved even more clearly fall outside the scope of the privilege, for petitioner agreed to keep them open for inspection, not only by application of law, but by his voluntary contract. The privilege against self-incrimination may be waived and, by his contract, petitioner did waive it as to books and records relating to the contract.

We do not contend that the Fourth Amendment, in so far as it protects petitioner from unlawful invasion of his privacy, is inapplicable.[5]

[5] The principle that an unreasonable compulsory production of documents is a violation of the Fourth as well as the Fifth Amendment (*Boyd* v. *United States*, 116 U. S. 616; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298) has no relevance here, for it is clear that there is

Even when government officers are entitled to examine books and records as a matter of right, they may not, without benefit of legal process, break into an establishment in order to exercise that right. Cf. *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 364. However, the affidavits submitted on petitioner's motion to suppress establish that no forcible or otherwise improper invasion of petitioner's right of privacy was involved in the initial inspection and audit of his books and papers. The affidavit of Hilton Byars, the Navy accountant, alleges that petitioner's books and records had been placed in the custody of the Navy Department for inspection and audit, which was carried out by the F. B. I. inspectors by authority of the Navy's contracting officer (R. 193–194); and petitioner does not deny that he consented to the audit of his books by the Navy Department. Furthermore, the affidavit of petitioner's bookkeeper establishes that she cooperated with the agents by supplying records and furnishing requested information (R. 154–155). Although petitioner states in his affidavit that on November 6, while the inspection was already in progress, he protested that the agents had no power to examine his records, he admits that his employees continued in his presence to fur-

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no search of unreasonable scope involved in requiring petitioner to fulfill the terms of his contract by submitting to the examination of records relating to the contract. See *Endicott Johnson Corporation* v. *Perkins*, 317 U. S. 501, 510.

nish such information to the inspectors as was requested (R. 148–150).

Petitioner's contention that the audit of his books involved an unreasonable search is predicated on his argument that F. B. I. agents are not persons authorized to conduct examinations under Executive Order 9127 (see Appendix, *infra*, pp. 28–29), whereby the President designated certain agencies to exercise the power of inspection conferred by Title XIII of the Second War Powers Act (50 U. S. C. App., Supp. IV, 643, *infra*, pp. 27–28). However, the F. B. I. agents were acting under the auspices and by the authority of the Navy Department, one of the departments designated in the Executive Order, and, we submit, petitioner cannot question the authority of the Navy to use such personnel as it chose. Cf. *Cravens* v. *United States*, 62 F. 2d 261, 265 (C. C. A. 8), certiorari denied, 289 U. S. 733, holding that the fact that agents of the Department of Justice accompanied land bank examiners did not render inspection by the examiners invalid. Moreover, petitioner agreed by contract to keep his records "open at all times to the Government and its representatives" without limitation, thus conferring a right of inspection broader than may have been established by the statute.

In the light of the foregoing, we submit that the inspection of petitioner's books and records

involved no infringement of his privilege against self-incrimination under the Fifth Amendment or his right to privacy under the Fourth, and the information obtained therefrom, including the records themselves if not improperly obtained, could be used against him at his trial.

II

THE DEFICIENCIES IN THE SEARCH WARRANT BY WHICH THE BOOKS AND RECORDS WERE OBTAINED ARE IMMATERIAL SINCE THE RECORDS, AS INSTRUMENTALITIES OF THE CRIME DISCOVERED IN THE COURSE OF A LAWFUL INSPECTION, COULD PROPERLY BE SEIZED WITHOUT A WARRANT

At petitioner's trial the Government did not merely use the information obtained from its inspection of petitioner's books and records; it produced the records themselves as exhibits in court. Petitioner claims that the methods by which physical possession of the documents was obtained, i. e., alleged retention of the check to McAvoy and the search warrant of December 1, 1942, were illegal, and that such illegality required the court to suppress all use of the documents as evidence. We concede that the affidavit on which the search warrant of December 1 was based was defective in that it failed to set forth facts showing probable cause to believe that petitioner had committed an offense, and that, although it appears from the warrant that the Commissioner was informed that there was reason to believe that peti-

tioner had violated 18 U. S. C. 80 and 83 (R. 174–175), the deficiency in the affidavit renders the warrant invalid. *Grau* v. *United States,* 287 U. S. 124; *Siden* v. *United States,* 9 F. 2d 241, 243 (C. C. A. 8).

We submit, nevertheless, that the denial of petitioner's motion to suppress was proper. The exhibits which are here involved were instrumentalities of a crime. Exhibit 7, the $4,000 check to McAvoy, had no reason for existence other than as a means to defraud the United States by making it appear that petitioner had paid McAvoy about $1,500 more than McAvoy actually received. The other records were the means by which this fraud was made to appear legitimate in the business records open to inspection by the Navy Department and hence were also property used as a means of committing a felony.[6] *Marron* v. *United States,* 275 U. S. 192, 199; *United States* v. *Lindenfeld,* 142 F. 2d 829 (C. C. A. 2), certiorari denied; 323 U. S. 761. As such they have the status of contraband, i. e., they are articles which the

[6] Exhibit 7 was, unquestionably, the most important of the exhibits used to establish the counts under which petitioner was convicted. The other exhibits, business records, were introduced *seriatim* (R. 421–426) and merely completed the picture by showing that the check was reflected on petitioner's books of account (R. 429–430, 453). These exhibits were not significant, since the vouchers filed by petitioner with the Navy Department (Government Exhibit 19) in themselves show that petitioner based his $4,000 claim on check No. 4679, i. e., Exhibit 7 (R. 362–363).

defendant has no right to retain and the Government has a right to take.

Where in the course of a peaceable and lawful inspection, government officers discover an article which is an instrumentality of a crime, they are justified in seizing the article immediately without a search warrant. It is well established that, as incident to a lawful arrest, officers may search and seize instrumentalities of the crime for which the arrest is made. *Marron* v. *United States,* 275 U. S. 192, 199; *Agnello* v. *United States,* 269 U. S. 20, 30. If, in the course of such a search, they come upon instrumentalities of a wholly different crime, such articles may also be seized. *Harris* v. *United States,* 151 F. 2d 837 (C. C. A. 10), certiorari pending, No. 700, this Term; *Matthews* v. *Correa,* 135 F. 2d 534 (C. C. A. 2); *Shelton* v. *United States,* 50 F. 2d 405 (C. C. A. 6). The same principle has been applied where instrumentalities of crime have been discovered by officers in the course of other lawful investigations. *Bennett* v. *United States,* 145 F. 2d 270 (C. C. A. 4), certiorari denied, 323 U. S. 788; *United States* v. *Old Dominion Warehouse, Inc.,* 10 F. 2d 736 (C. C. A. 2); *United States* v. *Camorata,* 278 Fed. 388 (S. D. Cal.) (articles seized not mentioned in the search warrant by which entry was obtained); *Milam* v. *United States,* 296 Fed. 629 (C. C. A. 5) certiorari denied, 265 U. S. 586 (unlawfully imported aliens discovered in a truck

which was stopped on reasonable grounds to believe that it was carrying liquor); *In re 14 East 17th Street,* 65 F. 2d 289 (C. C. A. 2) (smuggled goods discovered after entry by consent); *United States* v. *Two Soaking Units,* 48 F. 2d 107 (C. C. A. 2), certiorari denied, 284 U. S. 627; *Hilsinger* v. *United States,* 2 F. 2d 241, 243 (C. C. A. 6), certiorari denied, 266 U. S. 622 (contraband discovered during lawful inspection). The facts here fall within the rationale of these cases. During the course of a lawful inspection, government investigators discovered a gross fraud against the United States perpetrated by means of Exhibit 7 and the books in which that check was reflected. Unquestionably, the officers could have testified to what they found. As Judge Parker stated in *Paper* v. *United States,* 53 F. 2d 184 (C. C. A. 4), in which testimony by officers that they had found liquor while searching for defendant in order to arrest him, was held admissible—

> The purpose of the Fourth Amendment was to prevent the use of "governmental force" to search a man's house, his person, his papers or his effects and to prevent their seizure against his will. *Olmstead* v. *U. S.,* 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944, 66 A. L. R. 376. Most cases of search in violation of this constitutional provision involve the element of trespass, i. e. the entry without right upon the prem-

> ises of the citizen. And all cases of unlawful search will be found to involve either this element or some element of fraud or subterfuge, as where an arrest is made a pretext for a search, or where the right to search having been obtained ostensibly for one purpose is used in reality for another. *Henderson* v. *U. S.* (C. C. A. 4th), 12 F. (2d) 528, 51 A. L. R. 420; *Thompson* v. *U. S.* (C. C. A. 4th), 22 F. (2d) 134. But where the entry and search are rightful and there is present no element of trespass or fraudulent invasion of the rights of the citizen, there is no reason for excluding evidence of crime discovered in the course of the search. If the officers, in this case, had discovered in the cellar a counterfeiting plant in operation, would it have been their duty to ignore it? If they had come upon the body of a murdered man, would their testimony as to finding the body be excluded?

By the same token, the officers in the circumstances supposed would have been justified in seizing the liquor as contraband. Where officers discover the instrumentalities of a crime in the course of a lawful search they are not obliged to take the risk that such instrumentalities will be altered or destroyed. As Judge Hand stated in *United States* v. *Old Dominion Warehouse, Inc., supra*, 10 Fed. at 738:

> If we suppose the case of goods which we are more used to thinking of as inher-

> ently contraband, like a burglar's kit, or counterfeiting paraphernalia, the case appears to us plain. We cannot suppose that, if an officer entered lawfully upon a warrant limited to certain described articles of this kind, he would not be justified in taking without warrant any others which he might chance upon in the premises. His seizure would not depend upon the warrant, but upon the fact that they were in their nature caput lupi; it would be as little an "unreasonable seizure" as to take property from a person arrested. * * *

The fact that books and records are here involved, rather than illicit liquor or other property more patently tainted with illegality, does not affect the outcome. As we shall show (*infra*, pp. 22–26), evidence lawfully derived even from records which are not instrumentalities of crime may be used in a criminal trial. Where the records are themselves the means of committing the crime they are essentially contraband and may be taken and used.

In this case, the entry into petitioner's premises was lawful; the books examined were those which petitioner by law and by contract was required to keep open for inspection; the records taken were those which petitioner had, through his own act, rendered subject to seizure as a means of committing a felony. *United States* v. *Sherry*, 294 Fed. 684 (N. D. Ill.). As such we think they were subject to seizure without a warrant

when they were discovered or at any subsequent time when access to them could be obtained peaceably. The warrant of December 1, 1942 was therefore unnecessary, and its invalidity is immaterial.

III

ASSUMING THAT A SEARCH WARRANT WAS NECESSARY IN ORDER TO OBTAIN PHYSICAL POSSESSION OF THE RECORDS, THE DEFICIENCY IN THE AFFIDAVIT ON WHICH THE WARRANT WAS BASED WAS A TECHNICAL ERROR WHICH DID NOT JUSTIFY SUPPRESSION OF THE USE OF THE DOCUMENTS AS EVIDENCE

Even if the F. B. I. agents would not have had authority to take physical possession of the documents here involved without legal process, we think that the deficiency in the warrant by which possession was obtained, together with retention of the check if it occurred, is merely a formal defect under the facts of this case; that the deficiency, if noted on petitioner's motion to suppress, could have been corrected and production of the documents compelled; and hence that admission of the records does not constitute reversible error.

The inspection of petitioner's books and records was lawful, as we have shown. The deficiency in the warrant thus would have affected at most the right to physical custody of the documents, and not the right to the information obtained therefrom. The only relief to which petitioner

would have been entitled on his motion to suppress would have been the return of the documents; the court would not have been warranted in suppressing evidence based upon them. See *In re Sana Laboratories,* 115 F. 2d 717, 718 (C. C. A. 3), certiorari denied, 312 U. S. 688, in which documents seized during the course of a lawful inspection were ordered returned but information obtained therefrom was not suppressed. As the Third Circuit held in that case:

> * * * If the subsequent seizure and removal from the premises were unlawful because the petitioners were entitled to the possession of the documents, this wrong has been cured by the return of the papers under the order rendered by the trial court. But the removal from the premises of papers which government agents were, under the circumstances, entitled to inspect upon the premises did not render sacrosanct information secured from these papers because it was lawfully open to the government. It is only knowledge gained by the government's own wrong which cannot be used.

See also *United States* v. *Lee,* 274 U. S. 559, 563, in which this Court ruled that "A later trespass by the officers, if any, did not render inadmissible in evidence knowledge legally obtained."

If the documents had been returned to petitioner on his motion to suppress, possession could thereafter have been obtained by means of a sec-

ond warrant. As we have shown (*supra*, p. 17–18), the documents were the instrumentalities of a crime and thus property "used as the means of committing a felony" within the purview of the Search Warrant Act (18 U. S. C. 612, *infra*, p. 30). Information as to the commission of a crime by petitioner and knowledge of the records as the means of committing it were obtained, not by means of the invalid warrant, but through the lawful inspection of petitioner's records. In applying for a second warrant the Government would not have been obliged to use knowledge gained by its own wrong, but would have relied upon information secured by the prior investigation. Cf. *Nardone* v. *United States*, 308 U. S. 338, 341; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392. Hence, a second warrant could lawfully have been issued and the records again seized and introduced as evidence before the conclusion of the trial. See *Parts Mfg. Corp.* v. *Lynch*, 45 F. Supp. 854 (S. D. N. Y.), affirmed 129 F. 2d 841 (C. C. A. 2), certiorari denied, 317 U. S. 674. In view of this fact, we think that the trial judge could properly disregard the illegality in the affidavit by which the warrant was obtained and that, in any event, his failure to do so was not prejudicial error, since the records could in any event have been produced in court by proper means.

The function of the search warrant in this case was different from the usual purpose of such war-

rants.. Normally a search warrant is the means by which government officers obtain the right to invade a person's privacy and to enter a place where they would otherwise have no right to be. When a warrant used for such a purpose is defective, the result is an illegal invasion of the fundamental right to privacy, and the evidence is suppressed on the theory that the Government may not profit from its own wrongdoing. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, 392. Here, however, the warrant, if needed, was merely the means of bringing into court records which were not privileged and which had already been lawfully examined without violating the right to privacy. Had the Government not taken possession of the documents, the officers could nevertheless have testified to what they found. *Paper* v. *United States,* 53 F. 2d 184 (C. C. A. 4), *supra,* p. 19-20. Had they taken photostats during the course of the examination, the photostats could have been offered in evidence without producing the originals. *Darby* v. *United States,* 132 F. 2d 928 (C. C. A. 5); *Lisansky* v. *United States,* 31 F. 2d 846, 850 (C. C. A. 4), certiorari denied, 279 U. S. 873; *Madden* v. *United States,* 20 F. 2d 289, 294 (C. C. A. 9), certiorari denied, *sub nom. Parente* v. *United States,* 275 U. S. 554. The search warrant here was merely the means of insuring production in court of the primary source of evidence otherwise admissible. Under

such circumstances, the reason for the observance of strict rules in determining the validity of warrants does not exist. Since there was no wrongdoing in the method by which relevant information was obtained from the exhibits, we submit that the technical deficiency in the method by which the exhibits were brougt into court could properly be disregarded by the trial judge.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court below should be affirmed.

J. HOWARD MCGRATH,
Solicitor General.

THERON L. CAUDLE,
Assistant Attorney General.

RALPH F. FUCHS,
Special Assistant to the Attorney General.

ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

FEBRUARY 1946.

APPENDIX

Section 10 (1) of the Act of July 2, 1926, c. 721, 44 Stat. 784, 10 U. S. C. 10 (l), provides:

> The manufacturing plant, and books, of any contractor for furnishing or constructing aircraft, aircraft parts, or aeronautical accessories, for the War Department or the Navy Department, or such part of any manufacturing plant as may be so engaged, shall at all times be subject to inspection and audit by any person designated by the head of any executive department of the Government.

Title XIII, Section 1301 of the Second War Powers Act of March 27, 1942, 56 Stat. 185, 50 U. S. C. App. Supp. IV, sec. 643, provides:

> The provisions of section 10 (*l*) of an Act approved July 2, 1926 (44 Stat. 787; 10 U. S. C. § 310 (*l*) (giving the Government the right to inspect the plant and audit the books of certain Contractors), shall apply to the plant, books, and records of any contractor with whom a defense contract has been placed at any time after the declaration of emergency on September 8, 1939, and before the termination of the present war: *Provided*, That, for the purpose of this title, the term "defense contract" shall mean any contract, subcontract, or order placed in furtherance of the defense or war effort: *and provided further*, That the inspection and audit authorized herein, and the determination whether a given contract is a "defense con-

tract" as defined above, shall be made by a governmental agency or officer designated by the President, or by the Chairman of the War Production Board.

Executive Order 9127 issued April 10, 1942 (7 F. R. 2753 provides:

> By virtue of the authority vested in me by the Constitution and laws of the United States, and particularly by Title I of the First War Powers Act, 1941, and Title XIII of the Second War Powers Act, 1942, as President of the United States and Commander in Chief of the Army and Navy of the United States, and in order to prevent the accumulation of unreasonable profits, to avoid waste of Government funds, and to implement other measures which have been undertaken to forestall price rises and inflation, it is hereby ordered as follows:
>
> 1. I hereby designate the War Production Board, the War Department, the Navy Department, the Treasury Department, the United States Maritime Commission, and the Reconstruction Finance Corporation as the governmental agencies authorized to inspect the plant and to audit the books and records, as provided by Title XIII of the said Second War Powers Act, 1942. Such inspection and audit and the determination whether a given contract is a defense contract, as defined in Title XIII of the Second War Powers Act, 1942, may be made in the case of (a) any contractor with whom a defense contract has been placed by such agency, or, in the case of the Reconstruction Finance Corporation, by any corporation created or organized by it, at any time after

the declaration of emergency on September 8, 1939, and before the termination of the present war, and in the case of (b) any subcontractor performing work required by any such defense contract. The Chairman of the War Production Board is authorized to issue rules and regulations and to establish policies to coordinate and govern the War Department, the Navy Department, the Treasury Department, the United States Maritime Commission, and the Reconstruction Finance Corporation in exercising the functions vested in them by this order.

2. The authority herein conferred may be exercised by the Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the United States Maritime Commission, and the Board of Directors of the Reconstruction Finance Corporation, respectively, or in their discretion and by their direction, respectively, may be exercised also by and through any officer or officers or civilian officials of their respective departments and agencies designated by them for those purposes. The Chairman of the War Production Board, the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the United States Maritime Commission, or the Board of Directors of the Reconstruction Finance Corporation may authorize such officer or officers or civilian officials of their respective departments or agencies to make further delegations of such powers and authority within their respective departments and agencies.

The Search Warrant Act, Title XI of the Espionage Act of June 15, 1917, 40 Stat. 228, 18 U. S. C. 611 et seq., provides in pertinent part as follows:

> SEC. 2. A search warrant may be issued under this title upon either of the following grounds:
>
> 1. When the property was stolen or embezzled in violation of a law of the United States; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was stolen or embezzled, or from any person in whose possession it may be.
>
> 2. When the property was used as the means of committing a felony; in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be.
>
> * * * * * *
>
> SEC. 3. A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched.
>
> SEC. 4. The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their depositions in writing and cause them to be subscribed by the parties making them.
>
> SEC. 5. The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

U. S. GOVERNMENT PRINTING OFFICE: 1949

FILE COPY

IN THE

Supreme Court of the United States

1946

OCTOBER TERM, 1945

No. 489

EDWARD E. ZAP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING AND BRIEF IN SUPPORT OF WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 489

EDWARD F. ZAP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING.

To the Honorable Chief Justice Harlan F. Stone and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Edward F. Zap, respectfully petitions for rehearing upon the following grounds, to-wit:

I.

This case raises special and important questions of fundamental law relating to constitutional rights of private persons holding government contract never heretofore determined by this Honorable Court and also raises fundamental questions of criminal procedure which have not heretofore been, but should be, determined by this Honorable Court.

The case is also decided by the Circuit Court of Appeals for the Ninth Circuit in conflict with applicable decisions of this Court relating to constitutional rights and other matters of criminal law and procedure. It has also decided important questions of general law in a way untenable and in conflict with the weight of authority. (Rule 38(5b), U. S. Supreme Court.

II.

The petitioner is one of the foremost experimental inventors in the world. He has been aeronautical consultant for the United States Navy since the Lindbergh flight. [R. 556, 560, 561.]

The judgment in the District Court involving two counts of violation of Title 18, Section 80, both relating to the same transaction, provides for imprisonment of nine months and for a fine of $2,000.00 on each count [R. 69], and the effect of the judgments being affirmed would be to deprive him of being able to serve the Navy and other branches of the government in the experimental work in which he is so skilled.

In the Circuit Court, the judgments were affirmed without opinion on the merits, because of asserted non-conformance with a rule of court regarding specification of errors. (151 F. (2d) 100.) We beliexe this rule was erroneously construed.

The questions raised in this case involve the violation of the defendant's constitutional and statutory rights under the Fourth and Fifth Amendments to the Constitution of the United States, and certain fundamental questions of procedure relating to the indictment, selection of jurors, sufficiency of evidence and instructions of the Court in which errors vitally and prejudicially affecting

petitioner occurred. This Court has never permitted either rules of court or mere technicalities to deprive an accused of fundamental and constitutional rights.

It is, therefore, important that a rehearing be granted, and that certiorari be granted to determine the law with reference to these fundamental rights. Where this Court has even denied certiorari, it has later, on petition for rehearing, granted the same and reserved the case where fundamental constitutional rights were called to its attention.

White v. Texas, 310 U. S. 530.

This Court has repeatedly granted hearings where convictions were based upon evidence unlawfully secured, in violation of an accused's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States.

McNabb v. U. S., 318 U. S. 332;

Amos v. U. S., 255 U. S. 313, 65 L. ed. 654;

Goldman v. U. S., 316 U. S. 129, 86 L. ed. 1322;

Gouled v. U. S., 255 U. S. 298, 65 L. ed. 647;

Jack Davis v. U. S., Number 404 (1945 Term).

Or where the evidence is insufficient and should be directed:

Keegan v. U. S., 89 Law Edition 1314 (Nos. 39-44, October, 1944 Term);

Schneiderman v. U. S., 320 U. S. 118, 136.

Or where the Court failed to instruct the jury on the law relating to the only issues involved.

Screws v. U. S., 89 L. Ed. 1029.

Or where fundamental matters of criminal procedure in violating liberty are involved.

Miller v. U. S., 317 U. S. 192, 87 L. Ed. 179;
Edwards v. U. S., 312 U. S. 473, 482.

Or where the Circuit Court has not passed on issues presented by an adequate assignment of errors.

Lonergan v. U. S., 82 L. Ed. 630.

Wherefore, petitioner prays that a rehearing be granted and that certiorari be granted.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

Certificate of Counsel.

I do hereby certify that in my judgment the foregoing Petition for Rehearing is well founded and I do further certify that said petition is not interposed for the purpose of delay.

MORRIS LAVINE.

Subscribed and sworn to before me this 27th day of December, 1945.

MARGUERITE F. CRIPPS.
Notary Public in and for the State of California, County of Los Angeles.

My commission expires January 3, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 489

EDWARD F. ZAP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF THE WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Circuit Court of Appeals [R. 805-807] is reported in 151 Fed. (2d) 100, 101.

Jurisdiction.

The decision of the Circuit Court of Appeals affirming the judgment below was filed June 4, 1945. [R. 807,808.] A petition for rehearing, duly filed, was denied September 13, 1945. [R. 809.] The petition for writ of certiorari was filed October 8, 1945, and was denied December 10, 1945. December 11, 1945, the Court stayed its order denying certiorari and granted leave to file a petition for rehearing and another brief in support of the petition for certiorari.

The jurisdiction of the Supreme Court is conferred by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules 11 and 13 of the Criminal Appeals Rules promulgated by the Supreme Court May 7, 1934. The petition for rehearing is filed pursuant to Rule 33 of the Rules of the Supreme Court, and supporting brief is filed pursuant to the order of this Court of December 11, 1945.

Questions Presented.

For the questions presented, reference is made to those questions set out in the Petition for the Writ of Certiorari. (Petition pp. 19 to 23.)

Reasons for Allowing the Writ.

Reference is made to the reasons set out in the Petition (pp. 24 to 26).

Statutes Involved.

Title 18, Section 80 (presenting false claims). The Fourth and Fifth Amendments to the U. S. Constitution: Title 18, Sections 611-616, regarding such warrants: U. S. Code, Title 50, Section 643 (First War Powers Act), and the President's Executive Order 9127; Title 28, Section 411, U. S. Code, regarding selection of jurors according to state practice; Code of Civil Procedure of California, Section 204.

Specification of Errors.

The Court is respectfully referred to that part of the Petition which sets forth the questions presented (pp. 19 to 23), and to that part which sets forth the reasons for the allowance of the writ (pp. 24 to 26). We set forth as specification of errors each of the matters therein set forth and as set forth in our assignment of errors in the record [R. 754-773] and the additional errors of procedure in the Circuit Court of Appeals.

Summary of Facts.

Reference is made to the facts as set out in the Petition (pp. 3 to 18), as though fully set out here.

Summary of Argument.

I.

THE DISTRICT AND CIRCUIT COURTS ERRED IN REFUSING TO SUPPRESS THE EVIDENCE AND IN PERMITTING THE BOOKS AND RECORDS SEIZED WITHOUT A SEARCH WARRANT TO BE INTRODUCED IN EVIDENCE TO CONVICT THE PETITIONER. [Assignments of Error 12, 13, 15, 16, 17, 22.]

II.

THE DISTRICT COURT ERRED IN FAILING TO GIVE THE JURY ANY INSTRUCTIONS AS TO THE APPLICABLE STATUTES ON THE CASE, AND THE DECISIONS OF THE COURTS BELOW ARE, THEREFORE, IN CONFLICT WITH THIS COURT'S HOLDING IN SCREWS V. U. S., 89 L. ED. 1029 AT 1039.

III.

THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY THAT THE WORD WILLFUL MEANS "CONDUCT MARKED BY CARELESS DISREGARD AS TO WHETHER OR NOT THE THING DONE IS LAWFUL." [R. 689.]

IV.

THE DISTRICT COURT ERRED IN FAILING TO DIRECT THE VERDICT.

ARGUMENT.

I.

The District and Circuit Courts Erred in Refusing to Suppress the Evidence and in Permitting the Books and Records Seized Without a Search Warrant to Be Introduced in Evidence to Convict the Petitioner. (Assignments of Error 12, 13, 15, 16, 17, 22.)

As the Government has conceded that the search warrant of December 1, 1943 is based upon an insufficient affidavit, the search and seizure of petitioner's books and records, Government's Exhibits 32 to 45, were in violation of the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States and the timely motion to suppress the same in advance of trial should have been granted. Furthermore, the use of these books and records in evidence over strenuous objections violated the defendant's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States. The Government contended in the Court below and contends here that the authority of the Navy Department to inspect the books and records of a Navy contractor by a Navy cost inspector was sufficient grounds for giving another agency of the Government, not authorized by statute or executive order, namely, the Federal Bureau of Investigation, the right to make not only an inspection but to search and seize the books and records of a prime defense contractor, without any search warrant, and permits their use in evidence, without any process or showing of probable cause, in a criminal prosecution of the defense contractor. This we assert is error, and the statute and executive orders permitting inspection did not and does not nullify the protection and guarantees of the Fourth and Fifth Amendments.

The questions thus raised have never been passed on by this Honorable Court, and are fundamental.

The record shows that on October 20, 1942, two agents of the Federal Bureau of Investigation came into Zap's plant while Zap was away and began going over the books and records from day to day. [R. 151 *et seq.*] They had no search warrant or any legal process or pretended process. A Navy civilian inspector named Greenfield objected to their looking at the Navy books and records, and refused to give Mr. Myerson of the F. B. I. the books as he had not seen a search warrant, but Myerson insisted they had a right to do so, saying "I have a right to do this. I am a member of the F. B. I. and whatever I see fit to do, I account for myself." [R. 150.]

Hilton Byars, a senior accountant, a civilian, employed by the United States Navy, filed an affidavit in which he stated that two F. B. I. agents, to-wit, Murray B. Myerson and James C. Sloane, connected with offices at Los Angeles, for a period of six or seven weeks, commencing on or about October 20, 1942, made an audit and inspection of the books of account and record of Edward F. Zap at Zap's place of business, 1005 Broxton Avenue, Los Angeles, California, "under the auspices of and by and with the authority of your affiant and Lieutenant Lucien Smith Minor of and for the United States Navy." [R. 193-194.]

Byars stated:

> "That at all times during said period from on or about October 20, 1942, to and including the 1st day of December, 1942, all said books of account and records of Edward F. Zap pertaining to and under said contracts were within the custody of the United States Navy, pursuant to said contracts and

the terms and provisions thereof, and said United States Navy refused and declined to permit any person whatsoever to remove any of said books of account and records, or either of them, without a warrant." [R. 195.]

On December 1st, F. B. I. agent Myerson, who had been conducting the search for six or seven weeks, made an application for a search warrant and an affidavit in support thereof. [R. 177-178.] This affidavit is now acknowledged to have been faulty.

(a) Do the statutes and executive orders permitting inspection of prime defense contractors' books as construed and applied by the courts below in the instant case contravene the defendant's constitutional rights guaranteed against search and seizure under the Fourth and Fifth Amendments to the Constitution, where F. B. I. agents were permitted by a Navy auditor to inspect books without any process or search warrant, and thereafter the agent seized the books without any affidavit showing probable cause or sufficient in its context to form the basis of a proper search warrant?

(b) May a subordinate auditor for the Navy delegate the right to inspect the books and records of a prime defense contractor to subordinates in the Federal Bureau of Investigation?

(c) Is it lawful or proper to make out an affidavit for search warrant based upon an unauthorized inspection?

(d) Assuming, as the Government has admitted in this case, that no proper affidavit for search warrant was made

out for the search and seizure, are F. B. I. agents nevertheless authorized to make such seizure without a search warrant, or is the defense contractor protected in criminal proceedings by the provisions of the Fourth Amendment, and Sections 611 to 616 of Title 18, forbidding any search and seizure without a search warrant and without a showing of probable cause?

In a recent case of *Davis v. U. S.*, Second Circuit, No. 404, this term, this Court has granted certiorari where the Government contended it had a right to go on private premises and seize O. P. A. stamps without a search warrant, because the stamps were the property of the Government. In the present case, it is not contended that the books and records, Exhibits 32 to 45, were the property of the Government, nor was it ever contended that the check for $4,000.00, Government's Exhibit 7, was ever the property of the Government, or one that the Government had a right to inspect.

Government's Exhibit 7 was a private check on Zap's private bank account. It was seized November 5 without any warrant. The motion to suppress it was denied. It is, therefore, fundamentally important for this Court to determine whether there is a right to search and seize without a search warrant, as required by the Fourth Amendment to the Constitution of the United States, and by Sections 611 to 616, Title 18, United States Code, and use these documents in evidence in a criminal trial.*

*See statutes involved as Appendix in the Petition.

Under Title 10, United States Code, the Government is given the right of inspection of accounts and records of contractors, but by the terms of the amendment, 50 United States Code Appendix, Supplement 4, Section 643, and Executive Order 9127, that right is limited strictly to the agencies and the chairmen of agencies mentioned in the Executive Order. The Federal Bureau of Investigation is not mentioned in the order.

The authority to delegate the inspection is only given to the chairmen of the various departments specified in this Executive Order, to-wit, the Navy, the Army, the War Production Board, the Treasury Department, the United States Maritime Commission, and the Reconstruction Finance Corporation, solely to persons "within their respective departments and agencies."*

In any event, not even the Government claims that the Secretary of the Navy ever granted any authority to the Federal Bureau of Investigation or delegated any such authority. Its sole claim in this case is that one of the civilian cost inspectors gave permission to the Federal Bureau of Investigation agents to make the inspection. It is important for this Court to determine whether any agent in any of the departments thus mentioned by the Presidential Order, might, without the consent of the head of the department, or under any condition, permit some unauthorized person to inspect and seize the books

---

*See pages 7, 8 of Petition.

and records of a prime defense contractor engaged in confidential work for the United States Navy. No cases, so far as we have been able to find, touch upon this fundamental question of criminal law under the Fourth and Fifth Amendments to the Constitution, and we believe it is important for this Court to grant a hearing to determine it.

Authority to delegate the right of inspection must be conferred either by statute or the executive order issued pursuant thereto. Otherwise the power does not exist.

> *Cudahy Packing Company v. Holland*, 315 U. S. 357, 363.

The right of inspection has always been and must be differentiated from the right of search and seizure.

> *People v. Richter* (N. Y.) 265 Appellate Division 767.

The right of inspection, even if it were deemed authorized, does not permit seizure. The Fourth Amendment to the Constitution forbids two things: (1) search, (2) seizure.

> *Boyd v. U. S.*, 116 U. S. 616, 641, 29 L. Ed. 752;
> *Takahashi v. U. S.*, 143 Fed. (2d) 118.

(e) The check for $4,000.00, Government's Exhibit 7, should have been suppressed under any circumstances. It is not claimed that this check was part of any books and records authorized or required to be kept. It was only claimed that the check was secured by a request from

Ethyl Boyle, the bookkeeper, who could not waive defendant's constitutional rights to his private, personal property. The decision of the District Court and the decision of the Circuit Court are, therefore, in conflict with the decisions of this Court.

Amos v. U. S., 255 U. S. 313, 65 L. ed. 654;
Gouled v. U. S., 255 U. S. 298, 65 L. ed. 647;
Weeks v. U. S., 232 U. S. 383, 58 L. ed. 652;
Boyd v. U. S., 29 L. ed. 752;
Agnello v. U. S., 70 L. ed. 145;
Goldman v. U. S., 316 U. S. 129, 86 L. ed. 1322;
Byers v. U. S., 71 L. ed. 520;
Silverthorne Lumber Company v. U. S., 64 L. ed. 317.

The record in this case also discloses that the books and records, Government's Exhibits 32 to 45, as well as the contents of Government's Exhibit 7, the check, were made out without the knowledge as to their contents by the petitioner. Miss Boyle testified that the petitioner was so busy she seldom saw him [R. 468], and that the petitioner frequently signed checks and other papers in blank for his employees to fill out when he was away from the office. [R. 468.]

It is, therefore, important that this court grant a hearing to determine these fundamental questions of search and seizure, and to protect petitioner under his fundamental rights.

II.

The District Court Erred in Failing to Give the Jury Any Instructions as to the Applicable Statutes on the Case, and the Decisions of the Courts Below Are, Therefore, in Conflict With This Court's Holding in Screws v. U. S., 89 L. Ed. 1029 at 1039.

This case also raises another fundamental question of criminal law and procedure. The petitioner having been charged in counts 4 and 5 with the offense of filing a false claim and making a false statement within the knowledge of the Government willfully and knowingly, the offenses required proof of specific intent on the part of the Government, and also required that the jury should know the exact statutory definition of the offenses so that it might measure the proof as against the requirements of the statute. When the court instructed the jury, it gave general instructions to the jury, but at no time gave specific instructions as to the statutes involved, as was done by the court in the case of *U. S. v. Bittinger*, 24 Fed. Cases, 1150 (Case No. 14,599), and in the case of *Bridgeman v. U. S.*, 140 Fed. 577, 592.

The decision of the Circuit Court affirming the judgment of the District Court, therefore, was in conflict with this court's holding in *Screws v. U. S.*, 89 L. ed. 1029 at 1039, where this court held that where the essential ingredients of the offense for which the conviction could be had was not submitted to the jury, that the court erred and this court reversed the judgment. It is respectfully submitted that the court below, in failing to give any instructions to the jury on the only offenses on trial, and defining the statutory offenses, is in conflict with this court's decision and with *Corson v. U. S.*, 147 Fed. (2d) 439, and the applicable law generally on this subject.

It is, therefore, important for this court to grant a hearing because of the decision in the court below, contrary to this court's holding in the *Screws* case and the law applicable generally to the matter of instructions regarding the specific offense for which the accused is in trial.

III.

The District Court Erred in Instructing the Jury That the Word Willful Means "Conduct Marked by Careless Disregard as to Whether or Not the Thing Done Is Lawful." [R. 689.]

The District Court also erred in the instruction that it gave regarding the word "willful". It is, therefore, important that this court grant a hearing because the instruction given by the District Court is contrary to the statute itself in this particular case, which requires guilty knowledge, and a specific intent, and cannot rest upon a careless disregard as to whether or not the thing done is lawful.

Under the instruction of the court the jury could very properly convict the appellant for carelessness in the acts of his employees, or for failing personally to check items of account. The statute was not designed to punish such acts, but to punish the deliberate "knowing and willful" filing of a false claim with evil intent and purpose as a positive act, or the willful making of a false statement as a positive act, or a willful trick, scheme or device as a positive act.

But guilty knowledge is made a specific part of Title 18, section 80, and the instruction flies in the face of that section.

This section not only requires allegation of knowledge and willfulness, but proof thereof.

But "conduct marked by careless disregard as to whether the thing done is lawful" is lack of knowledge through carelessness as against the clear requirements of the statute that one is only guilty who makes or presents a claim "knowing such claim to be *false, fictitious or fraudulent,*" or who shall "*knowingly and wilfully*" make or cause to be made a false or fraudulent statement or representation, etc.

Screws v. U. S., 89 L. Ed. 1029;

People v. Tiedeman, 120 Cal. 137.

IV.

The District Court Erred in Failing to Direct the Verdicts.

The verdicts should have been directed, because of variance between the pleadings and the proof, and because there was no proof of any guilty knowledge on the part of Zap.

The verdict should have been directed because of variance between the pleadings and the proof. Specification of error IV. [Assignment of Error No. 27—R. 759.]

The only claim which the Government sought to prove here was a claim for $4,300. We moved for a directed verdict on the ground that the indictment charges an item of $4,000 whereas the claim is for $4,300. Also on the ground that the item as far as McAvoy is concerned varied from the terms and facts alleged in the indictment. [H. 719.]

There is no claim for $4,000. A claim for $4,300 is surely not one for $4,000. We think that the motion to direct the verdict on this ground alone also should have been granted.

It was shown that Zap signed papers and checks in blank and left them to be filled in by his office help. It was also shown that whatever amounts were put on any checks were put there by direction of a certified public accountant and a bookkeeper, and without Zap's personal knowledge. [R. 467, 469; R. 221, 222.] Since the statute requires proof of specific knowledge and fraudulent intent, the failure to prove such knowledge or intent entitled the defendant to a directed verdict under the statute.

COUNT IV.

Count 4 alleges that the claim (which the Navy prepared itself and which was countersigned by Navy Inspectors) was for expenses for services "falsely therein set forth to have been rendered by McAvoy." The claim, which was public voucher introduced in evidence in this case as Government's Exhibit 19 [page 2 of Exhibit], does not falsely therein set forth that any monies were paid for expenses for McAvoy, but only lists "other direct charges." In the Federal Court, the proof must conform to the pleadings, and an indictment must be proved substantially as laid.

U. S. v. Corlin, 44 Fed. Supp. 940.

Furthermore, it was shown by the evidence that the authority for $4,000.00 was for flight tests and expenses, and the indictment, in alleging that the claim was false because the money actually had not been paid, is not proof that it had not been incurred, and that the obligation was due on items of flight testing, which are considered a part of the test, such as insurance of the pilot, the flying of the plane to and from the sight, the cost and expenses of the pilot, and many types of insurance. [R. 305, 487.]

COUNT V.

As to Count 5 it is alleged that the defendants Zap and Scott did falsify and conceal and did cover up by trick, scheme, and device, a material fact and make and cause to be made a false statement as follows:

> "On or about the 23rd day of September, 1942, defendants Edward F. Zap and Lloyd Scott did falsely *state* and *represent* to *Hilton Byars*, who was then and there the United States Navy Cost Inspector, that the sum of $4,000 had been paid to William H. McAvoy for acting as test pilot in conducting certain tests pursuant to said contract 83142 and did present to said Cost Inspector in support of said false statement and representation a cancelled check for $4,000 endorsed by said William H. McAvoy. The defendants had previously presented to said McAvoy a check in blank and requested said McAvoy to endorse the same. That said McAvoy did so endorse the same."

Nowhere in the record is there any evidence that the defendants, or either of them, falsely *stated*, or ever *stated* or *represented to Hilton Byars* that the sum of *$4,000* had been paid to McAvoy for acting as a test pilot. Byars did not so testify. Nowhere in the record is there any evidence that a cancelled check for $4,000 endorsed by William H. McAvoy was ever presented to the said *Cost Inspector* (Byars), in support of said *false statement*. [R. 516.] Byars did not so testify.

Keegan v. U. S.; 89 L. ed. 1314;

Schneiderman v. U. S., 320 U. S. 118, 136.

Other points are sufficiently set forth in our petition and fully urged herein.

Conclusion.

For the reasons stated in the petition and in this brief, the petition for rehearing and the application for a writ of certiorari should be granted.

Respectfully submitted,

MORRIS LAVINE,

Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 489.—October Term, 1945.

Edward F. Zap, Petitioner, vs. The United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[June 10, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

This case is here on a petition for a writ of certiorari from a judgment affirming the conviction of petitioner for violation of § 35(A) of the Criminal Code, 18 U. S. C. § 80.[1] 151 F. 2d 100.

Petitioner entered into contracts with the Navy Department under which he was to do experimental work on airplane wings and to conduct test flights. He was to be paid on a cost plus fixed fee basis. He arranged with a pilot to make certain test flights and paid him about $2500. Prior to the test flights he had the pilot endorse a blank check, telling him that it was to be used to defray the expenses for the test. He then filled in the test pilot's name as payee and $4000 as the amount of the check. The check was posted in petitioner's books of account as a payment to the test pilot. Later petitioner presented to the Navy Department a voucher for work under his contract. Supporting the claim was a document in which he certified that he had paid the test pilot $4000.

[1] "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Congress has provided for the inspection and audit of books and records of contractors such as petitioner.[2] The inspection and audit were authorized to be made "by a governmental agency or officer designated by the President, or by the Chairman of the War Production Board."[3] Certain officials of the government, including the Secretary of the Navy, were authorized to exercise the power; and they were also delegated the power to "authorize such officer or officers or civilian officials of their respective departments or agencies to make further delegations of such powers and authority within their respective departments and agencies."[4] And petitioner's contract with the Navy Department provided: "The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government."

For several weeks in 1942 agents of the Federal Bureau of Investigation conducted an audit of petitioner's books and records at his place of business and during business hours. They acted under the auspices and by the authority of an accountant and a cost inspector of the Navy Department under whose jurisdiction petitioner's books and records had been placed for pur-

[2] Sec. 10(1) of the Act of July 2, 1926, 44 Stat. 787, 10 U. S. C. § 310(1) provides: "The manufacturing plant, and books, of any contractor for furnishing or constructing aircraft, aircraft parts, or aeronautical accessories, for the War Department or the Navy Department, or such part of any manufacturing plant as may be so engaged, shall at all times be subject to inspection and audit by any person designated by the head of any executive department of the Government."

Title XIII, § 1301 of the Second War Powers Act of March 27, 1942, 56 Stat. 185, 50 U. S. C. App. Supp. IV, § 643 provides: "The provisions of section 10(1) of an Act approved July 2, 1926 (44 Stat. 787; 10 U. S. C. § 310(1) (giving the Government the right to inspect the plant and audit the books of certain Contractors), shall apply to the plant, books, and records of any contractor with whom a defense contract has been placed at any time after the declaration of emergency on September 8, 1939, and before the termination of the present war: *Provided*, That, for the purpose of this title, the term 'defense contract' shall mean any contract, subcontract, or order placed in furtherance of the defense or war effort: *and provided further*, That the inspection and audit authorized herein, and the determination whether a given contract is a 'defense contract' as defined above, shall be made by a governmental agency or officer designated by the President, or by the Chairman of the War Production Board." See H. Rep. No. 1765, 77th Cong., 2d Sess., pp. 12-13; S. Rep. No. 989, 77th Cong., 2d Sess., p. 9.

[3] See § 1301 *supra*, note 2.

[4] Executive Order No. 9127, issued April 10, 1942, 7 Fed. Reg. 2753.

poses of audit and inspection. During part of this period petitioner was absent. But while he was away, his employees granted the agents admission and cooperated with them by supplying records and furnishing information. When petitioner returned to the city, he made some protest against the examination. But the agents did not desist and continued to make the examination with the assistance of petitioner's employees. The $4,000 check was requested and it was given to one of the agents by petitioner's bookkeeper. It appears that the check was retained by the agent[5] and was introduced at the trial. The trial judge denied a motion to suppress the evidence. At the trial petitioner did not object to the admission of the check in evidence but later moved to have it stricken on the ground that it had been illegally obtained. The single question to which we limited the grant of the petition for a writ of certiorari is the propriety of the action of the District Court in allowing the check to be admitted.

As we have pointed out in *Davis* v. *United States*, No. 404, decided this day, the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived. And when petitioner, in order to obtain the government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts. Whatever may be the limits of that power of inspection, they were not transcended here. For the inspection was made during regular hours at the place of business. No force or threat of force was employed. Indeed, the inspection was made with the full cooperation of petitioner's staff. There is some suggestion that the search was unreasonable because made by agents of the Federal Bureau of Investigation who were not persons authorized to conduct those examinations. But they acted under the auspices and with the authority of representatives of the Navy Department who were authorized to inspect. The inspection was nevertheless an inspection by the Navy, though its officials were aided by agents of

[5] We accept that version of the episode. The other version is that the check was obtained under a search warrant. But the warrant was admittedly defective. So we treat the case as one where the check was seized without a warrant.

another department.[6] Moreover, the right to inspect granted by the contracts was not limited to inspections by the Navy but extended to inspections by any authorized representatives of the government among whom the agents of the Federal Bureau of Investigation are included.

The agents, therefore, were lawfully on the premises. They obtained by lawful means access to the documents. That much at least was granted by the contractual agreement for inspection. They were not trespassers. They did not obtain access by force, fraud, or trickery. Thus the knowledge they acquired concerning petitioner's conduct under the contract with the government was lawfully obtained. Neither the Fourth nor Fifth Amendment would preclude the agents from testifying at the trial concerning the facts about which they had lawfully obtained knowledge. See *Paper* v. *United States*, 53 F. 2d 184, 185; *In re Sana Laboratories, Inc.*, 115 F. 2d 717, 718. Even though it be assumed in passing that the taking of the check was unlawful, that would not make inadmissible in evidence the knowledge which had been legally obtained. *United States* v. *Lee*, 274 U. S. 559, 563. The agents did not become trespassers *ab initio* when they took the check. See *McGuire* v. *United States*, 273 U. S. 95. Had the check been returned to petitioner on the motion to suppress, a warrant for it could have been immediately issued.[7] Or during the inspection, the agents could have taken photostats or made copies of the check and offered them in evidence without producing the originals. *Lisansky* v. *United States*, 31 F. 2d 846, 850-851. *Darby* v. *United States*, 132 F. 2d 928, 929. The agreement to allow an inspection carried consequences at least so great. The question therefore is a narrow one. It is whether the check itself could be introduced at the trial.

Weeks v. *United States*, 232 U. S. 383, held that private property obtained as a result of an unlawful search and seizure could not be used as evidence in a criminal prosecution of the owner. As explained in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392, the evidence so obtained is suppressed on the theory that the government may not profit from its own

[6] See Cravens v. United States, 62 F. 2d 261, 265.

[7] The Search Warrant Act, 40 Stat. 228, 18 U. S. C. § 612, permits the issuance of a search warrant for property used "as the means of committing a felony."

wrongdoing. But as stated in *McGuire* v. *United States, supra,* p. 99, "A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule." To require reversal here would be to exalt a technicality to constitutional levels. The search and the discovery were wholly lawful. A search warrant would be merely the means of insuring the production in court of the primary source of evidence otherwise admissible. Though consent to the inspection did not include consent to the taking of the check, there was no wrongdoing in the method by which the incriminating evidence was obtained. The waiver of such rights to privacy and to immunity as petitioner had respecting this business undertaking for the Government made admissible in evidence all the incriminating facts. We cannot extend the rule of the *Weeks* case so far as to bar absolutely the check itself. It was in the sound discretion of the District Court to admit it.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 489.—October Term, 1945.

Edward F. Zap, Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[June 10, 1946.]

Mr. Justice Frankfurter, with whom Mr. Justice Murphy and Mr. Justice Rutledge concur, dissenting.

The views expressed in my dissenting opinion in *Davis* v. *United States*, decided this day, likewise compel me to dissent in this case.

The petitioner is an aeronautical engineer. He made a contract with the Navy Department to perform experimental work. In June, 1942, the Navy agreed that Zap should carry out test flights to determine the value of his experimental work. The tests were to be paid for by the Navy on a cost-plus-a-fixed-fee basis. Zap estimated that the cost of these flights would be $4,000, but he made arrangements for the tests at a fee of $2,500. Prior to the flights, the test pilot indorsed a blank check which he returned to the petitioner. The petitioner's auditor instructed the bookkeeper to make the check for $4,000 and deposit it in the petitioner's account. The check was posted on the petitioner's books for payment to the pilot, though in fact the pilot received only $2,500.

In October, 1942, petitioner presented a voucher to the Navy for reimbursement for the money laid out in making the tests. The voucher was supported by a reference to the check for $4,000. From October 20, to December 1, 1942, two F. B. I. agents conducted an audit of the petitioner's books and papers, under the auspices of an accountant and inspector of the Navy. During this investigation one of the F. B. I. agents demanded and received the cancelled check for $4,000 made out to the pilot and endorsed by him. The agent retained the check. On December 1, 1942, one of the agents swore out an affidavit on the basis of which a search warrant was issued for the books and papers of the petitioner, and these books and papers were taken under the warrant. The war-

rant, it is conceded, was defective, inasmuch as the affidavit failed to show the necessary probable cause for the belief that the petitioner had committed an offense to warrant the seizure.

The petitioner was convicted of defrauding the government. Criminal Code, § 35A, 35 Stat. 1088, 1095, 40 Stat. 1015, 48 Stat. 996, 52 Stat. 197, 18 U. S. C. § 80. He made a timely motion to suppress the cancelled check and other records. The motion was denied, the documents were admitted in evidence, conviction and its affirmance followed. 151 F. 2d 100. The sole question before us is the validity of the seizure.

I agree that the government had authority, as a result of its contract with the petitioner and the relevant statutes, to inspect the petitioner's books and records, 44 Stat. 780, 787, 10 U. S. C. § 310(1), 56 Stat. 176, 185, 50 U. S. C. App. § 643, and that the Navy Department could utilize members of the F. B. I. for this purpose. Accordingly, the search was legal and the inspectors could testify to what they had gleaned from the inspection. But, as is pointed out in my dissent in *Davis* v. *United States*, decided this day, the Constitutional prohibition is directed not only at illegal searches. It likewise condemns invalid seizures. And that is the issue here. The legality of a search does not automatically legalize every accompanying seizure.

The Government argues very simply that the seizure was authorized since the seized items were uncovered in a lawful search. But this is to overlook what we ruled in *Marron* v. *United States*, 275 U. S. 192, 196: "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officers executing the warrant." If where a search instituted under the legal process of a warrant, which also authorizes seizure, does not permit seizure of articles other than those specified, statutory and contractual authority merely to search cannot be considered sufficient to grant that power. The Government relies on a doctrine quite inapposite here. If, in the course of a valid search, materials are uncovered, the very possession or concealment of which is a crime, they may be seized. But to seize for evidentiary use papers the possession of which involves no infringement of law, is a horse of a different color.

Petitioner's right to possession was clearly recognized by the agents when they sought a warrant for the purpose of securing the evidence. That warrant was defective, however, and could not authorize the seizure. The Government deems this a "technical error." It is a "technicality" of such substance that this Court has frequently announced the duty to suppress evidence obtained by such defective warrants. *Cf. United States* v. *Berkeness*, 275 U. S. 149; *Grau* v. *United States*, 287 U. S. 124; *Sgro* v. *United States*, 287 U. S. 206; *Nathanson* v. *United States*, 290 U. S. 41. The fact that this evidence might have been secured by a lawful warrant seems a strange basis for approving seizure without a warrant. The Fourth Amendment stands in the way.

I would reverse the judgment.